UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM A. COOPER, JR., an individual, plaintiff,

v.

AMOCO PRODUCTION COMPANY AS EMPLOYER; AMOCO CORPORATION AS PLAN SPONSOR, ADMINISTRATOR, & NAMED FIDUCIARY FOR THE AMOCO CORPORATION AND PARTICIPATING AFFILIATES CORPORATE RESTRUCTURING SEVERANCE BENEFITS PLAN; & THE AMOCO CORPORATION AND PARTICIPATING AFFILIATES CORPORATE RESTRUCTURING SEVERANCE BENEFITS PLAN;

AMOCO PRODUCTION COMPANY AS EMPLOYER; STATE STREET BANK & TRUST COMPANY OF BOSTON AS NAMED FIDUCIARY FOR THE AMOCO EMPLOYEE SAVINGS PLAN; & AMOCO CORPORATION AS PLAN SPONSOR & CO-ADMINISTRATOR FOR THE AMOCO EMPLOYEE SAVINGS PLAN; & THE AMOCO EMPLOYEE SAVINGS PLAN;

Civil No. 95-C-1099-E.

ORDER DISMISSING ACTION WITH PREJUDICE.

AMOCO PRODUCTION COMPANY AS EMPLOYER; AMOCO CORPORATION AS NAMED FIDUCIARY, PLAN SPONSOR, & PLAN ADMINISTRATOR FOR THE AMOCO PERFORMANCE SHARE PLAN; & THE AMOCO PERFORMANCE SHARE PLAN;

AMOCO PRODUCTION COMPANY AS EMPLOYER; AMOCO CORPORATION AS PLAN SPONSOR, & PLAN ADMINISTRATOR FOR THE EMPLOYEE RETIREMENT PLAN OF AMOCO CORPORATION AND PARTICIPATING COMPANIES; & THE EMPLOYEE RETIREMENT PLAN OF AMOCO CORPORATION AND PARTICIPATING COMPANIES;
defendants.

ORDER DISMISSING ACTION WITH PREJUDICE.

The Court having being fully advised, finds good cause, and hereby grants plaintiff, **WILLIAM A. COOPER, JR.**'s, motion to dismiss this action with prejudice. The Court finds that the parties properly served in this case have resolved their dispute to the satisfaction of the respective party. The Court also finds that each such party has agreed to bear its or his own costs and attorney fees and to not attempt to shift such costs and fees to the opposing party.

Dated this 8th day of July, 1996

S/ JAMES O. ELLISON

Judge, U. S. District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THIRTEEN COLT, M-203,
40 MM GRENADE LAUNCHERS,
THREE MACHINEGUNS, AND
THREE FIREARMS SILENCERS

Defendants.

CIVIL ACTION NO. 91-C-861-C

JUDGMENT OF FORFEITURE

The Court having entered its Order enforcing the settlement agreement, whereby William Fleming consented to forfeit the thirteen defendant Colt M-203, 40 mm grenade launchers in the event that his criminal conviction was affirmed on appeal, and the conviction, having been affirmed by the Tenth Circuit in United States v. William Fleming, 19 F.3d 1325 (10th Cir. 1994) with *Certiorari* having been denied, it is hereby,

ORDERED, ADJUDGED, AND DECREED that the thirteen Colt M-203 Grenade Launchers described on Exhibit "A" attached hereto are hereby forfeited to the United States for disposition according to law.

(Signed) H. Dale Cook

H. DALE COOK, Senior Judge of the
United States District Court for
the Northern District of Oklahoma

EXHIBIT "A"

1. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175967.

2. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175556.

3. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175519.

4. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175856.

5. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175957.

6. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175518.

7. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175873.

8. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175917.

9. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175458.

10. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175921.

11. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175845.

12. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175539.

13. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175492.

14. One U.S. rifle, M-14, H&R Arms Co., serial number 491846, 7.62mm caliber, blue steel, woodstock, 22" barrel, 44 1/2" over all length, with bipod and strap.

15. One HK, MP5SD, 9mm machinegun, 6" barrel, 18" over all length, with collapsible stock, seral number 7993.

16. One HK, MP5SD, 9mm machinegun, 6" barrel, 18" over all length, with collapsible stock, serial number 3777.

17. One SD suppressor, 9mm, blue steel, 12" over all length, serial number 7993S.

18. One SD suppressor, 9mm, blue steel, 12" over all length, serial number 3777S.

19. One HE suppressor, 9mm, blue steel, 11 1/2" over all length, serial number Captain I.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOLLAR RENT A CAR SYSTEMS, INC.

Plaintiff,

vs.

E & J RENTAL & LEASING, INC., a corporation; N. DAVID JOHNSON, an individual; and O. L. ECK, an individual

Defendants.

No. 95-C-458-K

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER AND JUDGMENT

The claims presently before this Court were tried at a bench trial on May 1, 1996. Upon consideration of the pleadings and the evidence presented at the trial both by testimony and exhibit, the Court hereby enters its Findings of Fact and Conclusions of Law in accordance with Rule 52(a), Fed.R.Civ.P.

FINDINGS OF FACT

1. Dollar is a corporation incorporated under the laws of the State of Oklahoma with its principal place of business in Tulsa, Oklahoma. Dollar is duly authorized to transact business in the State of Oklahoma, and Dollar does transact business on a regular basis in the State of Oklahoma.

2. E&J is a corporation incorporated under the laws of a state other than Oklahoma, with its principal place of business in the State of Kansas.

3. Johnson is an individual domiciled and residing in the State of Kansas.

4. Eck is an individual domiciled and residing in the State of Kansas.

5. On July 24, 1991, an agreement entitled "Master Lease Agreement" was entered into between E&J and Dollar, for the purpose of leasing to E&J vehicles to be used in the operation of its Dollar Rent A Car franchise.

6. In connection with the execution of the Master Lease Agreement, Johnson executed a personal guaranty (the "Master Lease Agreement Guaranty"). Under the Master Lease Agreement Guaranty, Johnson guaranteed full payment of E&J's obligations under the Master Lease Agreement.

7. Dollar offers a vehicle leasing program under which its licensees may choose to participate. E&J leased cars for its rental car business from Dollar as well as from other lessors and manufacturers. Since 1993, E&J has not participated in the Dollar lease program, but it has remained a licensee, and it obtains cars from other sources.

8. Under the terms of the Master Lease Agreement and the accompanying lease programs,[1] in which E&J participated from 1991-1993, E&J was obligated to return leased vehicles to Dollar "free from any collision or other physical damage" and to purchase from Dollar any leased vehicle that was not eligible for return or was unacceptable to Dollar or the manufacturer, Chrysler. The vehicles were to be purchased by E&J at "the Lease Vehicle Purchase Formula" described in the Lease Program. E&J was also responsible for all costs incurred by Dollar due to rejection of the vehicle.

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[1] Pursuant to paragraph 1(A) of the Master Lease Agreement, each annual Lease Program in which E&J participated was deemed a part of the Master Lease Agreement and specifically incorporated by reference in the Master Lease Agreement with the same force and effect as if fully set forth therein.

9. Dollar or Chrysler was entitled to reject the cars for poor quality or sub-standard repairs, frame damage or hail damage. The Lease Return Procedures for Chrysler vehicles, set forth in Section 6 of the 1992 Lease Program, specifically provide:

> A lease vehicle under this program will not be eligible for return and must be purchased by Lessee if any of the following circumstances occur:
>
> * * *
>
> b) Vehicle has poor quality or sub-standard repairs or is determined to have had more than $1200 of previously repaired damage;
>
> * * *
>
> d) Vehicle has repaired or unrepaired damage to frame, cowl assembly, floor pan, roof panel, supporting post and rearmost framework, or vehicle has a cracked engine block or other major mechanical deficiency;
>
> e) Vehicle has evidence of fire, water, or hail damage, or submersion of vehicle under water.
>
> In addition to the items above, all vehicles which are missing, considered to be conversion thefts, and/or otherwise have unacceptable conditions as determined by Dollar or the manufacturer, must be purchased by Lessee.

10. Paragraph 5C of the Master Lease Agreement contained a provision for inspection of returned leased vehicles:

> LESSEE and a COMPANY designated vehicle condition inspection company or their agents shall inspect each Vehicle that is returned and provide a jointly signed report on the condition of the Vehicle to COMPANY. If LESSEE shall fail to provide an agent for such purposes, a condition report signed by the inspection company's agent shall be conclusive as to the condition of the inspected Vehicle.

11. The language of the 1993 Lease Program is the same in all material respects as the 1992 Lease Program.

12. Johnson signed the 1992 and 1993 Lease Programs containing the above terms.

13. All of the language of the Master Lease and the Program Documents was drafted exclusively by Dollar.

14. Three Imperials and a Dynasty returned in October 1992

a. In October 1992, E&J returned three Chrysler Imperials (VIN Nos. ND800273, ND800274, ND800275) and a Dodge Dynasty (VIN No. 793872) at the expiration of their respective lease terms. These vehicles had sustained hail damage while leased to E&J. E&J had repaired some of the hail damage using a technique called "paintless dent repair" ("PDR"), whereby 3/4" holes were drilled into the cars. Following the PDR work, Intermodal Technical Services ("ITS"), a vehicle condition inspection company designated by Chrysler, inspected the cars and found no hail damage. The cars proceeded to the Metro Auto Auction in Kansas City.

b. Upon inspection at the auction, an auction yard representative found that the cars still had some hail damage and noted the holes from the PDR work. Chrysler rejected the cars because they had marks of hail damage and because Chrysler believed that PDR constituted a poor quality or sub-standard method of repair. Chrysler believed that PDR compromised the safety and structural integrity of the cars.

15. Five Sundances returned in January 1994

a. In January 1994, E&J returned five Plymouth Sundances (VIN Nos. PN580946, PN580947, PN580950, PN580952, PN580953) to Dollar. An ITS agent inspected the cars on January 18, 1994 and found no frame or hail damage. The cars were sent to the Metro Auto Auction in Kansas City in January of 1994.

b. At the auction yard, an inspector found hail damage on all of the cars. Dollar rejected the cars as hail damaged.

16. Chrysler Imperial returned in September 1993

a. In September 1993, E&J returned a Chrysler Imperial (VIN No. PD147280) to Dollar. That vehicle was inspected by ITS on September 9, 1993, and the ITS inspector found no frame damage.

b. The vehicle was sent to the Metro Auto Auction in Kansas City in September of 1993. An auction inspector found that the hood, the left fender skirt, and the core support had been replaced. The left front frame rail had also been replaced with a used part. Chrysler rejected the car for having damage to the frame.

17. Damaged Dynasty

a. A Dodge Dynasty, (VIN No. ND793871), was severely damaged while in the possession of an E&J customer, thereby obligating E&J to purchase the vehicle.

b. Dollar's policy/procedure bulletin of October 20, 1992, directed all Dollar licensees to send payments for full vehicle payoffs to Lock Box Department No. 673. E&J, however, sent its check to Dollar for the Dodge Dynasty to the wrong lock box. The check was in the amount of $10,473.38, and the accompanying check stub stated, "To pay off 1992 Dodge Dynasty ND793871 . . . please send title by return mail."

c. On June 9, 1993, over seven weeks after E&J had first requested title for the Dynasty, E&J sent Dollar a check in the amount of $1,388.52 with an accompanying letter that stated that E&J owed Dollar $11,861.90 for a Pontiac Grand Prix and that the amount of the

check represented the difference between the Grand Prix balance and the purchase price of the Damaged Dynasty.[2]

d. Dollar accepted payment on the Grand Prix. Dollar employee Nicole Hubner documented her understanding of the agreement with Johnson regarding payment of the Pontiac and Dynasty: that payment for the Grand Prix would not constitute a release of E&J's obligation to purchase the Dynasty. Hubner's contemporaneous confirming letter states:

> Per our conversation Thursday, June 10th, 1993, E&J Rental & Leasing currently owes DRAC $10,045.88. The $10,473.38 E&J Rental & Leasing sent us for [the Damaged Dynasty] will be applied to [the Grand Prix] along with check #3361 in the amount of $1,388.52 which will clear invoice H0003038. E&J Rental & Leasing will then have an outstanding balance on H0002901 of $10,045.88 for [the Damaged Dynasty].

e. Dollar negotiated the $1,388.52 E&J check and allowed E&J to retain title to the Grand Prix.

f. Dollar sent E&J a letter dated June 10, 1993, stating that E&J "still had an outstanding balance . . . of $10,045.88 for vehicle ND793871." The Damaged Dynasty was subsequently delivered to Dollar, which sold it at auction for approximately $1,700. Dollar seeks to recover the difference between that sales price and the Lease Vehicle Purchase price.

18. Amount allegedly owed

a. The 11 vehicles described above, which E&J refused to purchase, were subsequently sold at auction, with the proceeds applied to the amounts E&J allegedly owed Dollar.

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[2] The check stated on its face that it represented "the diff. on ND793871 and NF292216 Pont. 92 . . . net due . . . $1,388.52." On the reverse side of the check was the following language: "Paid in full on 1992 Pont. 4 dr ID #IG2WH54T4NF292216."

b. The amount of money Dollar received from the sale of these cars, less credits Dollar was entitled to take, is set forth below:

Model	Model #	Net Sale Price
Dynasty	ND793871	$ 1,448.50
Dynasty	ND793872	$ 8,910.00
Imperial	ND800273	$13,290.00
Imperial	ND800274	$14,230.00
Imperial	ND800275	$12,840.00
Imperial	ND147280	$13,740.00
Sundance	PN580946	$ 7,240.00
Sundance	PN580947	$ 7,690.00
Sundance	PN580950	$ 6,690.00
Sundance	PN580952	$ 7,140.00
Sundance	PN580953	$ 6,690.00

c. The proceeds were insufficient to satisfy the alleged debt, and Dollar claims that E&J still owes Dollar more than $50,000.00 plus interest for the 11 vehicles. The total amount of the damages claimed by Dollar is $75,803.14.

CONCLUSIONS OF LAW

19. Jurisdiction. The parties' contacts with the State of Oklahoma are sufficient to establish personal jurisdiction. There is complete diversity of citizenship between the Plaintiff and Defendants, and the aggregate claims, exclusive interest and costs, total more than $50,000; therefore, subject matter jurisdiction exists pursuant to 28 U.S.C. § 1332. Venue is proper in this district pursuant to 28 U.S.C. § 1391.

20. Rejection of Damaged or Repaired Cars. With the exception of the Damaged Dynasty, the central dispute is whether Dollar properly rejected the leased vehicles under the applicable contracts, thereby forcing E&J to purchase them at a substantial loss.

a. Applicable legal principles. Several legal principles will guide this Court's determination of this question.

i. Adhesion contracts. Since both parties have made much of the question of whether or not the Master Lease Agreement and program documents are adhesion contracts, it is worth noting at the outset that these documents are, in fact, adhesion contracts under the Oklahoma Supreme Court's definition.

> The term refers to a standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a "take it or leave it" basis, without opportunity for bargaining power and under such conditions that the "adherer" cannot obtain the desired product or service save by acquiescing in the form agreement.

Rodgers v. Tecumseh Bank, 756 P.2d 1223, 1226 (Okla. 1988) (quoting Steven Fidelity and Casualty Co. of New York, 377 P.2d 284, 297 (Calif. 1963)).

Although the Master Lease Agreement and program documents qualify as adhesion contracts, such a finding does not necessarily diminish their enforceability. Adhesion contracts are not *per se* invalid or unenforceable. Rather, a court reviews an adhesion contract for fairness, and refuses to enforce those adhesion terms that are demonstrably unfair to the stuck party. 3 Corbin on Contracts, § 559A at 348 (1996 Supp.). This Court finds nothing in the relevant terms of the contract, or in the contracts' operation in the instant case, that is demonstrably unfair to E&J.

ii. Contra Proferentem. The doctrine of adhesion contracts is distinct from that of *Contra Proferentem*: whereby a court will construe a contract against the drafter. See 3 Corbin on Contracts § 559 at 262 (1960) (explaining that when there is ambiguity in the terms of a

contract and uncertainty as to which of two possible and reasonable meanings should be adopted, the court will adopt that one which is the less favorable in its legal effect to the party who chose the words.) Oklahoma law also compels interpretation of ambiguous terms of a contract against the drafting party. See Texas Co. v. Adelman, 99 P.2d 874, 876 (Okla. 1939); Okla. Stat. Ann. tit. 15, § 170 (West 1992 & Supp. 1996). Since Dollar drafted all of the applicable contract language, ambiguities in the contractual terms will be construed against Dollar.

iii. Covenant of good faith and fair dealing. Although the program documents grant Dollar (and Chrysler) relatively broad discretion to reject a leased vehicle,[3] this fact does not render the contracts invalid. See 1 Corbin on Contracts § 150 (1963) (explaining that personal satisfaction contracts are valid). Nevertheless, Dollar's conduct is subject to the implied covenant of good faith and fair dealing "that is infused by force of law into every contract." Hinson v. Cameron, 742 P.2d 549, 553-54 (Okla. 1987). This doctrine requires that neither party will injure the right of others to receive the benefits of their agreement. Id. at 553. Stated another way, the doctrine imposes a covenant on all contracting parties "that neither party, because of the purposes of the contract, will act to injure the parties' reasonable expectations nor impair the rights or interests of the other to receive the benefits flowing from their contractual relationship." First National Bank and Trust v. Kissee, 859 P.2d 502, 509 (Okla. 1993). It is therefore the duty

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[3] For example, after listing several specific circumstances under which a vehicle will not be eligible for return, the program documents contains the following catch-all provision: "In addition to the items above, all vehicles which are missing, considered to be conversion thefts, *and/or otherwise have unacceptable conditions as determined by Dollar or the manufacturer, must be purchased by Lessee.*" (Emphasis added). In addition, since most leased vehicles will ordinarily exhibit some degree of wear and tear and some may have undergone body repair, Dollar's and Chrysler's ultimate evaluation of whether the degree of damage or quality of repair is acceptable becomes a rather subjective determination.

of this Court to determine whether, based on the facts presented at trial and the credibility of the witnesses, Dollar's and Chrysler's rejection of the vehicles was reasonable and in good faith.

b. Merits. E&J contends that it is not obligated to purchase the cars in question on several grounds: the cars were improperly rejected; the multiple inspections conducted by Dollar and Chrysler were not provided for in the terms of the Master Lease Agreement; and Dollar and Chrysler acted unreasonably or in bad faith in rejecting the cars.

i. Propriety of rejection of cars. Chrysler's rejection of the vehicles was not improper under the terms of the applicable contracts. Nine of the vehicles were hail damaged.[4] Another car had repaired damage to its frame. The program documents explicitly list all of these characteristics as grounds for ineligibility. There is no ambiguity in the terms of the contract language that could be interpreted to compel another conclusion. E&J therefore breached the Master Lease Agreement by failing to pay to Dollar the amounts owed on the vehicles.

ii. Inspection procedure. E&J contends that Dollar or Chrysler was not entitled to conduct any inspection of the returned vehicles beyond that conducted by ITS as provided in the Master Lease Agreement. This Court holds that the auction yard inspections that revealed damage and body repairs did not violate the terms of the contracts, even when construed in favor of E&J. Although the Master Lease Agreement provided for inspection by "company designated vehicle condition inspection company," this provision did not preclude additional inspection by the manufacturer nor did it bind Dollar or the manufacturer to the findings of the initial

[4] This Court need not determine whether, as a matter of law, PDR constitutes a sub-standard or poor quality repair method, thereby entitling Dollar or Chrysler to reject PDR-repaired cars. The auction inspector detected hail damage on all of the PDR-repaired cars; therefore they were properly rejected.

inspection. Chrysler, as manufacturer, had the explicit right to reject leased vehicles. What made the vehicle ineligible for return under the terms of the contracts was the existence of damage or improper repairs; whether these conditions were discovered upon the initial inspection by ITS or a later inspection by agents of the auction house is immaterial. So long as Dollar establishes that the conditions for ineligibility existed, as Dollar did at trial, Dollar was entitled to reject the cars under the applicable contracts. Further, credible testimony at trial indicated that it is quite possible that ITS's inspections would miss hail damage because most of these initial inspections took place outside; whereas the inspections at the auction yard often took place under fluorescent lights where it was easier to see imperfections created by hail damage. This testimony tended to rebut E&J's allegations that the ITS inspection conclusively established that there was no existing damage to these cars.

iii. Bad faith. E&J contends that Chrysler's and Dollar's rejection of the vehicles was unreasonable or in bad faith in contravention of the implied covenant of good faith and fair dealing. E&J initially argued that Chrysler and Dollar rejected the cars in question not because they were damaged, but because they did not have very high resale values in comparison to other "hotter" models, such as minivans. Specifically, E&J alleged that Chrysler did not reject comparable numbers of Plymouth Voyager minivans that had similar hail damage but excellent resale value. Dollar rebutted these allegation by establishing at trial that Chrysler rejected more Plymouth Voyagers on a percentage basis than the supposedly low resale Imperials and Dynasties. Dollar established that the rejection rate for all vehicles returned to Chrysler was 4.6%. The rate for Imperials and Dynasties was 3.0% and 3.4% respectively, while the rate for the minivans was between 4.9% and 5.8%. In addition, this Court's finding that the auction inspection could

reasonably discover damage missed by the ITS inspection tends to rebut E&J's intimation that the findings of the auction inspectors were manufactured or bogus. In conclusion, there was no evidence that Dollar, or Chrysler, acted unreasonably or in bad faith in rejecting the cars in question.

21. Alleged accord and satisfaction with regard to the Damaged Dynasty. E&J admits that the Damaged Dynasty was ineligible for return under the terms of the contract, but contends that it was released from its obligation to purchase the Damaged Dynasty through the operation of the doctrine of accord and satisfaction.

a. Doctrine of accord and satisfaction. The Oklahoma Supreme Court defines accord and satisfaction as follows:

> An accord is an agreement whereby one of the parties undertakes to give or perform, and the other to accept in satisfaction of a claim, demand, or debt, either liquidated or unliquidated and unadjusted, and arising either from contract or tort, something other than or different from what he is or considers himself entitled to, and a satisfaction is the execution of such agreement. Accord and satisfaction, then, is the substitution of another agreement between the parties in satisfaction of the former one, and an execution of the latter agreement. . . . It is a substitution by agreement of the parties of something else in place of the original claim.

F.D.I.C. v. Inhofe, 16 F.3d 371, 374 (10th Cir. 1994) (quoting Gaspar v. Mayer, 43 P.2d 467, 472 (Okla. 1935)). Accord and satisfaction may apply in some circumstances notwithstanding a contemporaneous objection by the creditor.

> Generally, where the amount due is unliquidated or disputed, and a remittance of an amount less than that claimed is sent to the creditor, together with a statement that it is in full satisfaction of the claim, and the tender is accompanied by such acts or declarations as amount to a condition that, if the remittance is accepted, it is accepted in full satisfaction of the disputed claim, and the creditor is aware of such conditions the acceptance of such a remittance constitutes an accord and satisfaction, although the creditor protests at the time that the amount tendered is not accepted in full satisfaction.

Wilmeth v. Lee, 316 P.2d 614, 615-16 (Okla. 1957).[5]

A recent opinion by the Oklahoma Supreme Court underscored the requirement that both parties intend to reach such an agreement in order for there to be an accord and satisfaction.

> Whether the parties have reached an accord and satisfaction depends upon the circumstances in each case and must be ascertained from the parties' *intentions*. Evidence of an accord and satisfaction must show that the parties reached a meeting of the minds and that the purpose and intent of the parties was to discharge a prior obligation, and the question of intention is a question of fact to be determined by a jury, unless a jury is waived and the matter is tried to the court.

Cinco Enterprises, Inc. v. Benso, 890 P.2d 866, 874 (Okla. 1994) (emphasis added). See also F.D.I.C. v. Inhofe, 16 F.3d 371, 374 (10th Cir. 1994) (explaining that under Oklahoma law, accord and satisfaction only exists if settlement between parties was *intended* to discharge all obligations created by original agreement or agreements.)

b. Application to instant case. E&J has failed to make the necessary showing under the applicable law to establish accord and satisfaction. First, it is not even apparent from the pleadings or evidence what E&J contends it paid in satisfaction of its obligation on the Damaged Dynasty. E&J already owed on the Grand Prix; therefore, its payment on that

---

[5] Compare Hodges v. Anderson Drilling Co., 465 P.2d 784 (Okla. Ct. App. 1969) addressing accord and satisfaction where original amount owed is undisputed.

> A plea of defense setting up accord and satisfaction must allege some consideration for the agreement, or, in other words, that plaintiff obtained something of value by the new agreement, although the money value of the thing given need not be stated. Where defendant pleads payment and acceptance of a smaller sum in satisfaction of a larger liquidated or undisputed sum, it is necessary to allege some new consideration. If there is no consideration other than the mutual concessions of the parties, a plea of accord and satisfaction alleging payment and acceptance of a lesser amount in satisfaction of a larger amount claimed must allege that the amount of indebtedness was unliquidated and in dispute.

Id. at 786-87.

obligation could hardly be deemed to satisfy its separate and unrelated obligation with respect to the Damaged Dynasty. Second, even if this Court were to apply Wilmeth to a situation, such as the instant one, involving a liquidated amount, but see Hodges v. Anderson Drilling Co., 465 P.2d 784 (Okla. Ct. App. 1969), two of the requisite elements are missing in the instant case. There was no evidence, either in documents or the reported conversations, that E&J made any statement that its payment on the Grand Prix was in full satisfaction of Dollar's claim on the Damaged Dynasty. In fact, Johnson indicated in the accompanying letter as well as on the check itself that the remittance was to cover money owed on the Grand Prix, rather than in any satisfaction of Dollar's claim on the Dynasty. And there was no evidence of acts or declarations by E&J that amounted to a condition that if Dollar accepted the remittance for the Grand Prix, that amount was accepted in full satisfaction of the Dynasty obligation as well. Finally, under Benso, E&J failed to show that it and Dollar reached a meeting of the minds or that the purpose and intent of the parties was to discharge E&J's prior obligation with respect to the Dynasty. Dollar understood and maintained all along that the remittances would be applied to the Grand Prix, and that E&J would still owe on the Damaged Dynasty.

E&J has failed to prove accord and satisfaction. Therefore, E&J's obligation with respect to the Damaged Dynasty under the Master Lease Agreement was never discharged, and E&J remains obligated to purchase the Damaged Dynasty. E&J owes Dollar the difference between the sales price of $1,700 received by Dollar at auction and the Lease vehicle Purchase Formula price, plus interest.

22. Amount E&J owes Dollar under Master Lease Agreement. Dollar has proved that E&J owes $50,914.02 to Dollar for the eleven cars at issue in this litigation. The Master Lease

Agreement also obligates E&J to pay interest on "any amount due to [Dollar] hereunder that is not timely received at [Dollar's] office by the due date." (Master Lease Agreement ¶ 15(D)). Therefore, the total amount due to Dollar under the terms of the Master Lease Agreement for damages Dollar sustained as a result of the breach of contract by E&J is $75,803.14.

For the reasons stated herein, judgment is granted in favor of Dollar and against E&J in the amount of $75,803.14.

IT IS SO ORDERED THIS 5 DAY OF JULY, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT J. GETCHELL,

Plaintiff,

vs.

RADCO, INC.,

Defendant.

No. 95-C-607-K

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 8 day of July, 1996.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ZAKIYA S. AL-RIYAMY,

Plaintiff,

vs.

OKLAHOMA STATE UNIVERSITY, et al.,

Defendants.

No. 96-C-111-K

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 8 day of July, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BILLY J. FLOYD aka Billy James Floyd; KIMBERLY D. FLOYD aka Kimberly Diane Floyd; CITY OF SAND SPRINGS, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET
DATE JUL 10 1996

FILED

JUL 09 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Case No. 95 C 618K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that the Entry of Default by Court Clerk filed in this case on the 30th day of January, 1996, the Judgment of Foreclosure entered in this case on the 31st day of January, 1996 and the Notice of Sale filed on the 13th day of June, 1996 are hereby vacated; that the Marshal's Sale scheduled for the 5th day of August, 1996 is hereby canceled and the action is hereby dismissed without prejudice.

Dated this 8 day of July, 1996.

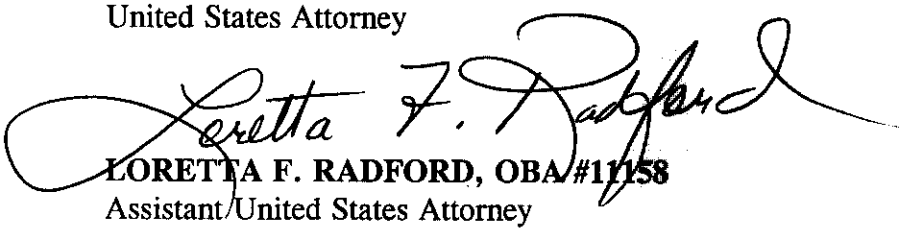
/s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED BY COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, OK 74103
(918) 581-7463

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL A. ONORATO aka DANIEL ANTHONY ONORATO aka D. A. ONORATO, JR.; VNB MORTGAGE CORP.; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET
DATE JUL 10 1996

FILED
JUL 09 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Case No. 95-C 1030K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED the Entry of Default by Court Clerk filed in this case on the 18th day of June, 1996 and the Judgment of Foreclosure entered in this case on the 20th day of June, 1996 are vacated and this action is dismissed without prejudice.

Dated this 8 day of July, 1996.

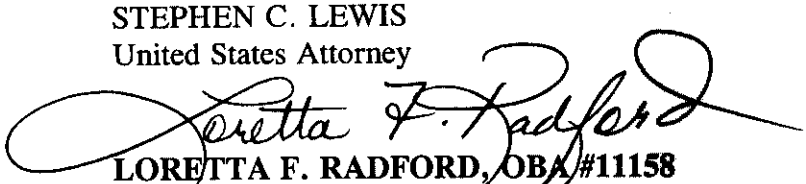
s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED BY PLAINTIFF TO PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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LFR:flv

ROUTE TO: 70
06/27/96

DOC#: 3103
31643

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 9 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE JUL 09 1996

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC. (R&M), a Pennsylvania corporation; and SUN COMPANY, INC., a Pennsylvania corporation,

DEFENDANTS.

CASE NO. 94-C-1059-H

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COME NOW the Parties, through their respective counsel, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, and stipulate to the dismissal of the above-styled and numbered action in its entirety, without prejudice to the filing of a future action, with each party to bear its own costs.

JOHN M. MERRITT - OBA #6146
MERRITT & ROONEY, INC.
P O BOX 60708
OKLAHOMA CITY, OKLAHOMA 73146
(405)236-2222
ATTORNEY FOR PLAINTIFF(S)

ROBERT P. REDEMANN #7454
P. O. BOX 21100
TULSA, OKLAHOMA 74121-1100
(918)582-1173
ATTORNEY FOR DEFENDANTS,
SUN COMPANY, INC. (R&M) and
SUN COMPANY, INC.

IN THE DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 9 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERRY PLEASANT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 95-C-1197-B**
	)	
SHIRLEY S. CHATER, Commissioner of Social Security,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE JUL 09 1996

ORDER GRANTING MOTION TO STAY

This Court, having reviewed the Motion to Stay filed herein by plaintiff, hereby **GRANTS** said Motion pending completion of newly instituted administrative procedures regarding drug/alcohol findings. This case is ordered Administratively Closed, and may be re-opened upon application of either party.

IT IS SO ORDERED.

DATED this 8th day of July, 1996.

JUDGE OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LYNDA L. HEARD aka Lynda Lee Heard fka Rhonda Jean Heard nka Rhonda Jean Matthews; CECILIA KAY HEARD; JOHN EDWARD HEARD; CRYSTAL JANE HEARD; THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN, OF Leslie Joe Heard, DECEASED; SERVICE COLLECTION ASSOCIATION, INC.; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES; CITY OF GLENPOOL, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED
JUL 8 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE JUL - 9 1996

CIVIL ACTION NO. 94-C-525-E

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of July 8, 1996 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendants, **Lynda L. Heard aka Lynda Lee Heard fka Rhonda Jean Heard nka Rhonda Jean Matthews, Cecilia Kay Heard, John Edward Heard and the unknown heirs, personal representatives, executors, administrators, devisees, trustees,** successors and assigns

immediate and remote, known and unknown of Leslie Joe Heard, Deceased, against whom judgment for affirmative relief is sought in this action have failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendants.

Dated at Tulsa, Oklahoma, this 8th day of July, 1996.

PHIL LOMBARDI, Clerk
United States District Court for the Northern District of Oklahoma

By _____ Deputy

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STEVEN CRAIG BROWN aka Steve Brown; SHIRLEY A. WEDGE dba Port Ketchum Resort; CITY OF BROKEN ARROW, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

JUL 8 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JUL 9 1996

Civil Case No. 95cv 1121E

ORDER OF SALE

UNITED STATES OF AMERICA TO: U.S. Marshal for the Northern District of Oklahoma

On June 18, 1996, the United States of America recovered a judgment In Rem against the Defendant, **Stephen Craig Brown**, in the above-styled action to enforce a mortgage lien upon the following described property:

> **Lot Fourteen (14), Block Nine (9), ARROW SPRINGS SECOND, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

The amount of the judgment is the sum of $79,397.74, plus interest at the rate of 10 percent per annum from March 21, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until fully paid, plus the costs of this action accrued and accruing. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them

are barred from claiming any right, title, interest, and equity in the property. The judgment provides that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the property according to Plaintiff's election with or without appraisement and to apply the proceeds to the payment of the costs of the sale; to the Defendant, County Treasurer, Tulsa County, Oklahoma, ad valorem taxes; to the judgment of Plaintiff, United States of America; and to the Defendant, County Treasurer, Tulsa County, Oklahoma, for personal property taxes. Any residue is to be paid to the Court Clerk to await further order of this Court.

THEREFORE, this is to command you to proceed according to law, to advertise and sell, with appraisement, the above-described real property and apply the proceeds thereof as directed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 8 day of July, 1996

PHIL LOMBARDI, Clerk,
United States District Court for
the Northern District of Oklahoma

By _____
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MOTOROLA, INC., a Delaware corporation,

Plaintiff,

v.

LARRY NATHAN GASS, an individual; JON DAVID ASTACIO, an individual; TULSA SECURITY PATROL, a business entity of unknown type; and ACTION HELICOPTERS, a business entity of unknown type, and DOES 1 through 10, inclusive,

Defendants.

Civ. Action No. 95-C-1156-C

[~~PROPOSED~~] ORDER GRANTING MOTION OF PLAINTIFF MOTOROLA, INC. FOR DEFAULT JUDGMENT AGAINST DEFENDANT JON DAVID ASTACIO

10

The Motion Of Plaintiff Motorola, Inc. For Default Judgment Against Defendant Jon David Astacio (the "Motion") has been presented to the Court.

Upon consideration of all papers submitted, arguments of counsel and all other matters presented to the Court and good cause appearing therefore;

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

MOTION IS HEREBY GRANTED in favor of Plaintiff Motorola, Inc.

DEFAULT JUDGMENT IS HEREBY ENTERED against Jon David Astacio in favor of Plaintiff Motorola, Inc. on its claims for copyright infringement, trademark infringement and false designation of origin;

1. **JUDGMENT IS HEREBY ENTERED** in favor of Motorola and against Defendant Jon David Astacio, in the sum of nine hundred four thousand Dollars ($ 904,000.00), the amount being the sum of total damages, costs and attorneys' fees.

2. **IT IS HEREBY ORDERED THAT** Defendant Jon David Astacio and all of his officers, directors, principals, agents, servants, employees, successors, immediate family members and assigns, and all those acting in active concert or participation with them and who receive actual notice of this injunction, **ARE HEREBY PERMANENTLY ENJOINED AND RESTRAINED FROM:**

a. Imitating, copying, or making unauthorized use of the following copyrighted works of authorship, including underlying works and derivatives and trademarks, owned by Motorola:

(i) "Radio Service Software for STX Radios (Version R03.01.00)" Certificate of Registration No. TX 3,611,297 and any labtools or other versions thereof;

(ii) "Radio Service Software for STX Radios (Version R02.00.00)" Certificate of Registration No. TX 3,611,298 and any labtools or other versions thereof;

(iii) "Radio Service Software for the MTX 800 and MTX 800 Products Family (MTX 800.EXE) (Version R02.00.02)" Certificate of Registration No. TX 3,432,605 and any labtools or other versions thereof;

(iv) "MT1000 Radio Service Software MT1000.EXE (Version R02.00.03)" Certificate of Registration No. TX 3,432,606 and any labtools or other versions thereof;

(v) "Radio Service Software for the Spectra 900 MHZ Mobile Radio (Version R01.00.03)" Certificate of Registration No. TX 3,425,144 and any labtools or other versions thereof;

(vi) "Radio Service Software for the MTX-820, MTX-820S, MTX-888, and MTX-888S Product Family (Version R01.00.00)" Certificate of Registration No. TX 3,436,309 and any labtools or other versions thereof;

(vii) "Radio Service Software for the Radius Mobile (Version R07.20.01)" Certificate of Registration No. TX 3,639,012 and any labtools or other versions thereof;

(viii) "Radio Service Software for Maxtrac (Version R05.03.00)" Certificate of Registration No. TX 3,632,771 and any labtools or other versions thereof;

(ix) "Radio Service Software for the Radius GP300/P110 (Version R03.00.00)" Certificate of Registration No. TX 3,545,723 and any labtools or other versions thereof;

(x) Motorola's Registered Trademark No. 1,674,103 for the Motorola design in International Class 9;

(xi) Motorola's Registered Trademark No. 887,046 for the name "Motorola" and design in International Class 7;

(xii) Motorola's Registered Trademark No. 1,365,383 for the name "STX" in International Class 9;

(xiii) Motorola's Registered Service Mark No. 1,680,185 for the name "Motorola" and design in International Classes 9 and 37;

(xiv) Motorola's Registered Trademark No. 1,671,037 for the name "Motorola" in block letters in International Class 9; and

(xv) Motorola's Registered Service Mark No. 847,770 for the Motorola design in U.S. Class 103;

c. Manufacturing, producing, distributing, acquiring, circulating, selling, offering for sale, advertising, promoting or displaying any product, advertising/ promotional material or thing bearing any simulation, reproduction, counterfeit, copy or colorable imitation of the works protected by the copyrights and trademarks listed in

subsection 2(a) above, any labtools or other versions thereof and/or any other work protected by a Motorola copyright or trademark;

d. Using any simulation, reproduction, counterfeit, copy or colorable imitation of the copyrights and trademarks listed in subsection 2(a) above, any labtools or other versions thereof and/or any other work protected by a Motorola copyright or trademark, in connection with the promotion, advertisement, display, sale, offering for sale, manufacture, production, transfer, circulation or distribution of any product, service, document, manual or thing not manufactured or offered for sale by Motorola;

e. Engaging in any other activity constituting an infringement of Motorola's rights in, to use, or to exploit, the copyrights and trademarks listed in subsection 2(a) above, and/or any other work protected by a Motorola copyright or trademark;

f. Disposing in any manner of any product merchandise, goods, materials, manuals or things in their possession, custody or control bearing any colorable imitation of or containing any copy or derivative of the copyrights and trademarks listed in subsection 2(a) above, and/or any other work protected by a Motorola copyright or trademark; and

g. Assisting, aiding, or abetting any other person or business entity engaging in or performing any of the activities referred to herein.

3. **IT IS ALSO HEREBY ORDERED THAT JON DAVID ASTACIO SHALL DELIVER INTO THE CUSTODY OF PLAINTIFF MOTOROLA, INC.:** copies of all products, merchandise and materials of any kind in Astacio's possession, custody or control, now or in the future, bearing any colorable imitation of or containing any copy or

derivative of the copyrights and trademarks listed in subsection 2(a) above, any labtools or other versions thereof and any other works protected by a Motorola copyright or trademark;

4. **IT IS FURTHER ORDERED THAT** all products, merchandise and materials seized by law enforcement authorities from Defendant Tulsa Security Patrol on August 4, 1994 and from the automobile of Defendant Jon David Astacio and all products, merchandise and materials in the possession, custody or control of the U.S. Attorney's Office or the Tulsa Police Department bearing any colorable imitation of or containing any copy or derivative of the copyrights and trademarks listed in subsection 2(a) above, any labtools or other versions thereof and/or any other work protected by a Motorola copyright or trademark **SHALL BE DELIVERED TO MOTOROLA FOR ITS USE AND DESTRUCTION WHEN SUCH ITEMS ARE NO LONGER NEEDED BY LAW ENFORCEMENT AUTHORITIES.**

UPON MOTION OF PLAINTIFF MOTOROLA, INC., AND GOOD CAUSE APPEARING THEREFORE, IT IS SO ORDERED, AND JUDGMENT IS SO ENTERED.

Dated: July 8, 1996

UNITED STATES DISTRICT JUDGE

Presented by:

MANATT, PHELPS & PHILLIPS, LLP
MARK S. LEE
SHARI MULROONEY WOLLMAN
CIEMA L. SALEM
11355 West Olympic Boulevard
Los Angeles, California 90064
Telephone: (310) 312-4000

By: _____
CIEMA L. SALEM

MOTOROLA, INC.
ROGER H. DUSBERGER
JOSEPH P. KRAUSE
1299 E. Algonquin Road
Schaumburg, Illinois 60196
Telephone: (847) 576-3000

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
MARK K. BLONGEWICZ
320 S. Boston, Suite 400
Tulsa, Oklahoma 74103-3708
Telephone: (918) 594-0451

ATTORNEYS FOR PLAINTIFF
MOTOROLA, INC.

CERTIFICATE OF MAILING

I CERTIFY that on the 28th day of June, 1996, a true and correct copy of the **[PROPOSED] ORDER GRANTING MOTION OF PLAINTIFF MOTOROLA, INC. FOR DEFAULT JUDGMENT AGAINST DEFENDANT JON DAVID ASTACIO** has been furnished by U.S. mail, with proper postage fully prepaid thereon, to the interested parties:

Mark Hongsoog

Steven M. Harris
DOYLE & HARRIS
P.O. Box 700450
Tulsa, OK 74170-0450

Jon D. Astacio
2885 W. 12th St.
Apt. 9M
Brooklyn, NY 11224

Roger Dusberger, Esq.
Motorola, Inc.
1303 E. Algonquia
Schaumberg, IL 60196

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLAUDE R. WILSON aka CLAUDE RAY WILSON, JR.; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95-C 1027E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3rd day of July, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendant, **Claude R. Wilson aka Claude Ray Wilson, Jr.**, appears not, but makes default.

The Court further finds that the Defendant, **Claude R. Wilson aka Claude Ray Wilson, Jr.**, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning February 1, 1996, and continuing through March 7, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due

diligence cannot ascertain the whereabouts of the Defendant, **Claude R. Wilson aka Claude Ray Wilson, Jr.**, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, **Claude R. Wilson aka Claude Ray Wilson, Jr.**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answers on October 25, 1995; and that the Defendant, **Claude R. Wilson aka Claude Ray Wilson, Jr.**, has failed to answer and his default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described

real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot Thirty-Two (32), Block Two (2), SUNSET ACRES ADDITION, a Subdivision to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on December 12, 1990, the Defendant, **Claude R. Wilson aka Claude Ray Wilson, Jr.**, executed and delivered to United Savings Association of the Southwest FSB, his mortgage note in the amount of $28,166.00, payable in monthly installments, with interest thereon at the rate of 8.59 percent (8.59%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, **Claude R. Wilson aka Claude Ray Wilson, Jr.**, executed and delivered to United Savings Association of the Southwest FSB, a mortgage dated December 12, 1990, covering the above-described property. Said mortgage was recorded on December 18, 1990, in Book 5294, Page 2284, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 27, 1990, United Savings Association of the Southwest FSB assigned the above-described mortgage note and mortgage to Liberty Mortgage Company. This Assignment of Mortgage was recorded on December 6, 1991, in Book 5366, Page 753, in the records of Tulsa County, Oklahoma, and a corrected assignment was recorded on June 10, 1993 in Book 5511, Page 2248 in the records of Tulsa County, Oklahoma.

The Court further finds that on May 13, 1993, Liberty Mortgage Company assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on May 14, 1993, in Book 5502, Page 2260, in the records of Tulsa

County, Oklahoma, and a corrected assignment was recorded on June 18, 1993 in Book 5514, Page 1863 in the records of Tulsa County, Oklahoma.

The Court further finds that on April 16, 1993, the Defendant, **Claude R. Wilson aka Claude Ray Wilson, Jr.**, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on January 19, 1994.

The Court further finds that the Defendant, **Claude R. Wilson aka Claude Ray Wilson, Jr.**, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Claude R. Wilson aka Claude Ray Wilson, Jr.**, is indebted to the Plaintiff in the principal sum of $31,612.37, plus interest at the rate of 8.59 percent per annum from January 17, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $315.05 for publication fees.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $14.00 which became a lien on the property as of June 26, 1992; $7.00 which became a lien as of June 25, 1993; and $7.00 which became a lien as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, **Claude R. Wilson aka Claude Ray Wilson, Jr.**, in the principal sum of $31,612.37, plus interest at the rate of 8.59 percent per annum from January 17, 1995 until judgment, plus interest thereafter at the current legal rate of 5.89 percent per annum until paid, plus the costs of this action in the amount of $315.05 for publication fees, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $28.00 for personal property taxes for the years 1991, 1992, and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **Claude R. Wilson aka Claude Ray Wilson, Jr.**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell

according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $28.00 plus interest and penalties for personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

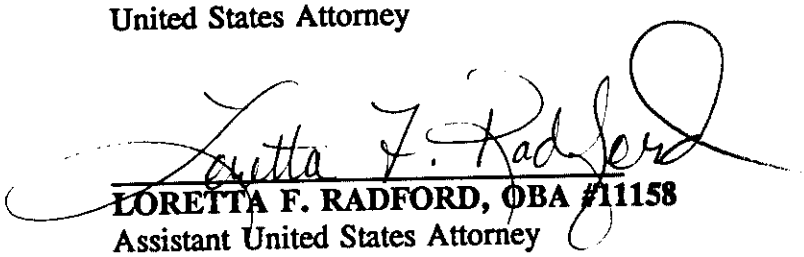
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 1027E

LFR/esf

NW 624

ENTERED ON DOCKET
DATE 7-9-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. ROBYN RENE UNFER; FLOYD WILLIAM FULLINGIM; LINDA DIANNE FULLINGIM; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	FILED JUL 08 1996 Phil Lombardi, Clerk U.S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA Civil Case No. 95-CV 893E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3rd day of July, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, **Robyn Rene Unfer, Floyd William Fullingim and Linda Dianne Fullingim, appear** not, but make default.

The Court further finds that the Defendants, **Robyn Rene Unfer, Floyd William Fullingim and Linda Dianne Fullingim**, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning February 14, 1996, and continuing through March 20, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is

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authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Robyn Rene Unfer, Floyd William Fullingim and Linda Dianne Fullingim**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Robyn Rene Unfer, Floyd William Fullingim and Linda Dianne Fullingim**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answers on September 27, 1995; and that the Defendants, **Robyn Rene Unfer, Floyd William Fullingim**

and Linda Dianne Fullingim, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT SEVEN (7), BLOCK ONE (1), BOWLIN ACRES, A SUBDIVISION TO THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on March 11, 1986, the Defendants, **Floyd William Fullingim and Linda Dianne Fullingim**, executed and delivered to Commonwealth Mortgage Corporation their mortgage note in the amount of $49,564.00, payable in monthly installments, with interest thereon at the rate of 10 percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, **Floyd William Fullingim and Linda Dianne Fullingim** his wife, executed and delivered to Commonwealth Mortgage Corporation a mortgage dated March 11, 1986, covering the above-described property. Said mortgage was recorded on March 20, 1986, in Book 4931, Page 248, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 28, 1986, Commonwealth Mortgage Corporation assigned the above-described mortgage note and mortgage to Citicorp Homeowners Services, Inc. This Assignment of Mortgage was recorded on July 24, 1986, in Book 4957, Page 2252, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 25, 1989, Citicorp Homeowners Services, Inc., successors in interest to Citicorp Mortgage, Inc. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, his successors and assigns. This Assignment of Mortgage was recorded on May 30, 1989, in Book 5185, Page 2151, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 8, 1986, Defendant, **Robyn Rene Unfer**, and Kenneth Scott Unfer, then husband and wife, became the title owners of the property by virtue of a General Warranty Deed, recorded on August 19, 1986 in Book 4963, Page 2581 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, **Robyn Rene Unfer**, and Kenneth Scott Unfer became the current assumptors of the subject indebtedness.

The Court further finds that Defendant, **Robyn Rene Unfer**, and Kenneth Scott Unfer were granted a divorce in case number 88-1817 on July 20, 1988 in Tulsa District Court, Tulsa County, Oklahoma.

The Court further finds that on April 18, 1989, the Defendant, **Robyn Rene Unfer**, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on May 9, 1990 and March 14, 1991.

The Court further finds that the Defendant, **Robyn Rene Unfer**, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Robyn Rene**

Unfer, is indebted to the Plaintiff in the principal sum of $75,264.25, plus interest at the rate of 10 percent per annum from April 15, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $273.05 for publication fees.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma,** has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $26.00 which became a lien on the property as of June 26, 1992; $16.00 which became a lien on June 25, 1993; and $16.00 which became a lien on June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma,** claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, **Floyd William Fullingim and Linda Dianne Fullingim,** are in default and have not right, title or interest in the subject property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, **Robyn Rene Unfer,** in the principal sum of $75,264.25, plus interest at the rate of 10 percent per annum

from April 15, 1995 until judgment, plus interest thereafter at the current legal rate of 5.89 percent per annum until paid, plus the costs of this action in the amount of $273.05 for publication fees, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $58.00 plus interest and penalties for personal property taxes for the years 1991, 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Floyd William Fullingim and Linda Dianne Fullingim**, are in default and have no right, title or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $58.00 plus interest and penalties, for personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

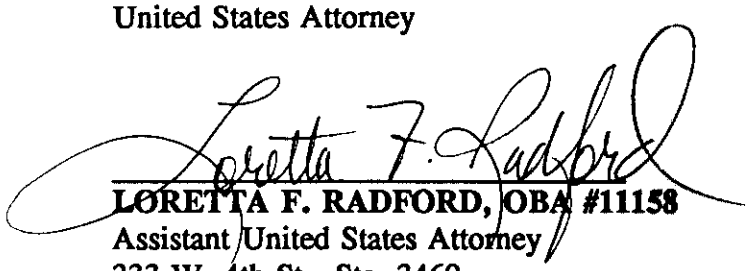
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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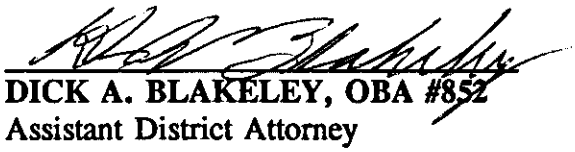

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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 893E

LFR/esf

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK L. MCKENZIE aka JACK MCKENZIE; CENTHYA A. MCKENZIE aka CINDY MCKENZIE; VICTORIA POND HOMEOWNERS' ASSOCIATION, INC.; TOWN OF JENKS, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 96CV 170E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3rd day of July, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, JACK L. MCKENZIE aka Jack McKenzie, CENTHYA A. MCKENZIE aka Cindy McKenzie, VICTORIA POND HOMEOWNER'S ASSOCIATION, INC., and TOWN OF JENKS, OKLAHOMA, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, JACK L. MCKENZIE aka Jack McKenzie, signed a Waiver of Summons on

April 2, 1996; that the Defendant, CENTHYA A. MCKENZIE aka Cindy McKenzie, signed a Waiver of Summons on April 2, 1996; that the Defendant, VICTORIA POND HOMEOWNERS' ASSOCIATION, INC., acknowledged receipt of Summons and Complaint on March 6, 1996, by Certified Mail; that the Defendant, TOWN OF JENKS, OKLAHOMA, acknowledged receipt of Summons and Complaint on March 6, 1996, by Certified Mail; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on April 29, 1996, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on March 21, 1996; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on May 16, 1996; and that the Defendants, JACK L. MCKENZIE aka Jack McKenzie, CENTHYA A. MCKENZIE aka Cindy McKenzie, VICTORIA POND HOMEOWNER'S ASSOCIATION, INC., and TOWN OF JENKS, OKLAHOMA, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, JACK L. MCKENZIE, is one and the same person as Jack L. McKenzie, and will hereinafter be referred to as "JACK L. MCKENZIE." The Defendant, CENTHYA A. MCKENZIE, is one and the same person as Cindy McKenzie, and will hereinafter be referred to as "CENTHYA A. MCKENZIE."

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Fourteen (14), Block Three (3), BLOCKS 1 thru 5 of VICTORIA POND, an Addition to the City of Jenks, Tulsa County, State of Oklahoma, according to the recorded Plat No. 4566.

The Court further finds that on October 6, 1987, the Defendants, JACK L. MCKENZIE and CENTHYA A. MCKENZIE, executed and delivered to HARRY MORTGAGE CO., their mortgage note in the amount of $83,350.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10½) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, JACK L. MCKENZIE and CENTHYA A. MCKENZIE, husband and wife, executed and delivered to HARRY MORTGAGE CO., a mortgage dated October 6, 1987, covering the above-described property. Said mortgage was recorded on October 9, 1987, in Book 5057, Page 216, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 16, 1987, HARRY MORTGAGE CO., assigned the above-described mortgage note and mortgage to EMPIRE OF AMERICA REALTY CREDIT CORP. This Assignment of Mortgage was recorded on October 27, 1987, in Book 5060, Page 309, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 27, 1989, EMPIRE OF AMERICA REALTY CREDIT CORP., assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING & URBAN DEVELOPMENT, his successors and assigns. This Assignment of Mortgage was recorded on September 29, 1989, in Book 5210, Page 1957, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 30, 1989, the Defendants, JACK L. MCKENZIE and CENTHYA A. MCKENZIE, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the

Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on November 13, 1989, August 17, 1990 and June 23, 1992.

The Court further finds that the Defendants, JACK L. MCKENZIE and CENTHYA A. MCKENZIE, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, JACK L. MCKENZIE and CENTHYA A. MCKENZIE, are indebted to the Plaintiff in the principal sum of $127,189.50, plus interest at the rate of 10½ percent per annum from May 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $69.00 which became a lien on the property as of June 25, 1993 and a lien in the amount of 62.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state income taxes in the amount of $598.55 which became a lien on the property as of January 2, 1996. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, JACK L. MCKENZIE, CENTHYA A. MCKENZIE, VICTORIA POND HOMEOWNERS; ASSOCIATION, INC.,

and TOWN OF JENKS, OKLAHOMA, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, JACK L. MCKENZIE and CENTHYA A. MCKENZIE, in the principal sum of $127,189.50, plus interest at the rate of 10½ percent per annum from May 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.89 percent per annum until paid, plus the costs of this action and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $131.00, plus costs and interest, for personal property taxes for the years 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and

recover judgment In Rem in the amount of $598.55, plus accrued and accruing interest, for its tax liens, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, JACK L. MCKENZIE, CENTHYA A. MCKENZIE, VICTORIA POND HOMEOWNERS' ASSOCIATION, INC., TOWN OF JENKS, OKLAHOMA and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, JACK L. MCKENZIE and CENTHYA A. MCKENZIE, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $131.00,

personal property taxes which are currently due and owing

Fourth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $598.00, plus accrued and accruing interest, for state income taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

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United States Attorney

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Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 96CV 170E

LFR:flv

ENTERED ON DOCKET
DATE 7-8-96

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUL 03 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CLIMATE CONTROL INSTITUTE OF OKLAHOMA, INC., an Oklahoma corporation, and ENGARD, INC., d/b/a PLATT COLLEGE, an Oklahoma corporation, Plaintiffs,	
vs.	Case No. 93-C-55 H
RICHARD W. RILEY, Secretary of the UNITED STATES DEPARTMENT OF EDUCATION, in his official capacity, Defendant.	
DICKINSON BUSINESS SCHOOL, INC., d/b/a CAREER POINT BUSINESS SCHOOL, a Missouri corporation, Plaintiff,	
vs.	(Consolidated with Case No. 93-C-198 H)
RICHARD W. RILEY, or his successor, in his official capacity as the SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, Defendant.	

ORDER GRANTING JOINT MOTION TO DISMISS ACTION AND TO DISSOLVE PRELIMINARY INJUNCTION

On the joint motion of plaintiff Dickinson Business School, Inc., d/b/a Career Point Business School ("Career Point") and defendant Richard W. Riley, the Secretary of the United States Department of Education (the "Secretary") to dismiss action and to dissolve preliminary injunction, pursuant to Fed. R. Civ. P. 41, and good cause having been shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all claims of Career Point herein are dismissed with prejudiced.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the preliminary injunction previously granted in favor of Career Point only, as against the Secretary is dissolved.

DATED this 3rd day of July 1996.

S/ SVEN ERIK HOLMES

HON. SVEN ERIK HOLMES
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLIMATE CONTROL INSTITUTE OF OKLAHOMA, INC., an Oklahoma corporation, and ENGARD, INC., d/b/a PLATT COLLEGE, an Oklahoma corporation, Plaintiffs, vs. RICHARD W. RILEY, Secretary of the UNITED STATES DEPARTMENT OF EDUCATION, in his official capacity, Defendant.	Case No. 93-C-55 H
DICKINSON BUSINESS SCHOOL, INC., d/b/a CAREER POINT BUSINESS SCHOOL, a Missouri corporation, Plaintiff, vs. RICHARD W. RILEY, or his successor, in his official capacity as the SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, Defendant.	(Consolidated with Case No. 93-C-198 H)

ORDER GRANTING JOINT MOTION TO DISMISS ACTION AND TO DISSOLVE PRELIMINARY INJUNCTION

On the joint motion of plaintiff Dickinson Business School, Inc., d/b/a Career Point Business School ("Career Point") and defendant Richard W. Riley, the Secretary of the United States Department of Education (the "Secretary") to dismiss action and to dissolve preliminary injunction, pursuant to Fed. R. Civ. P. 41, and good cause having been shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all claims of Career Point herein are dismissed with prejudiced.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the preliminary injunction previously granted in favor of Career Point only, as against the Secretary is dissolved.

DATED this 3RD day of July 1996.

HON. SVEN ERIK HOLMES
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In Re:

DAVID WAYNE STARKEY
d/b/a Green Acres Exotics,

Debtor/Appellant,

No. 95-C-156-K

O R D E R

Now before this Court is the Amended Notice of Appeal of David Wayne Starkey, Debtor/Appellant. Debtor seeks appeal from the Order of the United States Bankruptcy Court for the Northern District of Oklahoma filed March 1, 1995. In that Order, the bankruptcy court denied debtor's "Motion/Notice to Convert this Case to a Chapter 12 Case."

A district court's jurisdiction over appeals from orders of bankruptcy courts is governed by 28 U.S.C. § 158(a) which provides:

> (a) The district courts of the United States shall have jurisdiction to hear appeals
> (1) from final judgments, orders, and decrees;
> (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
> (3) with leave of the court, from other interlocutory orders and decrees;
> of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

See also Fed.R.Bank.P. 8001 (providing for appeal to district court of orders of bankruptcy court).

An order is final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *In*

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re Durability, Inc., 893 F.2d 264, 265 (10th Cir. 1990). The bankruptcy court's denial of Debtor's motion to convert the case is therefore not a final order, and this Court lacks jurisdiction to hear the appeal under 28 U.S.C. § 158(a)(1). *See In re Fraidin*, 188 B.R. 529 (D.Md. 1995) (holding that since bankruptcy court's order granting conversion of case from Chapter 11 to Chapter 7 was not a "final judgment," district court lacked jurisdiction to hear appeal of bankruptcy court's order).

The order from which Debtor seeks appeal is therefore an interlocutory order, and Debtor must obtain leave of the district court to appeal interlocutory orders. 28 U.S.C. § 158(a)(3).[1] Borrowing from the civil analogue, 28 U.S.C. § 1292(b), direct appeal from an interlocutory order of the bankruptcy court is appropriate only when the order involves a controlling question of law over which there is a substantial basis for disagreement and for which immediate appeal will advance the ultimate termination of the litigation. *In re Blinder Robinson & Co.*, 135 B.R. 899, 901 (D.Colo. 1992). The party seeking appeal of an interlocutory order bears the burden of showing why it should be granted. The Debtor has asserted no grounds for an interlocutory appeal, and this Court finds none.

Since the Order of the bankruptcy judge is not a final order and this Court denies leave to file an interlocutory appeal, this

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[1] The Court notes that the Debtor did not seek leave of court to file the instant appeal. However, under Bankruptcy Rule 8003(c), the Court considers the notice of appeal--[doc. #1] as amended [doc. #8]--as a motion for leave to appeal.

Court lacks jurisdiction under 28 U.S.C. § 158 to entertain this appeal. Treating Starkey's notice of appeal--[doc. #1] as amended [doc. #8]--as a motion for leave to appeal, the motion shall be DENIED, and the appeal shall be DISMISSED. The Clerk of the Court is directed to administratively terminate this action in his records.

ORDERED this 5 day of July, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL SALADIN,

Plaintiff,

vs.

TERRY TURNER, individually and d/b/a THE FRENCH HEN RESTAURANT, and d/b/a CAPISTRANO RESTAURANT,

Defendant.

No. 94-C-702-K

AMENDED JUDGMENT

This action came on for bench trial before the Court, Honorable Terry C. Kern, District Judge, presiding, and the decision having been duly rendered,

IT IS THEREFORE ORDERED that the Plaintiff Paul Saladin recover from the Defendant Terry Turner the sum of $7,038.92, with post-judgment interest thereon at the rate of 5.60 percent as provided by law.

ORDERED this 2 day of July, 1996.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL SALADIN,

Plaintiff,

vs.

TERRY TURNER, individually and d/b/a THE FRENCH HEN RESTAURANT, d/b/a CAPISTRANO RESTAURANT,

Defendant.

No. 94-C-702-K

O R D E R

Before the Court is the motion of the plaintiff to alter or amend judgment, pursuant to Rule 59(e) F.R.Cv.P. On May 24, 1996, the Court entered Findings of Fact, Conclusions of Law and Order ruling in plaintiff's favor on his claim under the Americans with Disabilities Act. The Court awarded plaintiff $4,048.63 in back pay and $2,500 in compensatory damages. A Judgment was contemporaneously entered in the total amount of $6,548.63 with post-judgment interest at a rate of 5.60% per annum.

Plaintiff has now filed a Rule 59(e) motion seeking an award of prejudgment interest. Such a motion is a proper vehicle for this request. See McNickle v. Bankers Life & Casualty Co., 888 F.2d 678, 682 (10th Cir.1989).[1] It is established "[u]nder Title

[1]Defendant filed a notice of appeal during pendency of the present motion. A notice of appeal filed while a timely Rule 59(e) motion is pending is ineffective to confer jurisdiction on a court of appeals. Hatfield v. Bd. of Cty. Com'rs, 52 F.3d 858, 861 (10th Cir.1995). This Court retains jurisdiction. Defendant has made no argument plaintiff waived an award of prejudgment interest by not requesting it earlier. Rule 54(c) F.R.Cv.P. provides in part: "[E]very final judgment shall grant the relief to which the party

VII, a district court is authorized to grant prejudgment interest on a back pay award. Otherwise, the employer would have an 'interest free' loan on wages due, but unpaid." Daniel v. Loveridge, 32 F.3d 1472, 1478 (10th Cir.1994) (citations omitted). Title VII remedies are available under the ADA. 42 U.S.C. §12117(a). The Court concludes prejudgment interest is available on a back pay award under the ADA as well. Whether prejudgment interest is needed to make a plaintiff whole is within the discretion of the district court. Hogan v. Bangor and Aroostook R. Co., 61 F.3d 1034, 1038 (1st Cir.1995).

Defendant objects to such an award, on the grounds (1) plaintiff prevailed on a novel theory of which defendant would not have been reasonably aware, (2) defendant is a small company with limited resources, and (3) this Court found defendant did not act maliciously. The Sixth Circuit has held an award of prejudgment interest was not an abuse of discretion, despite no finding of willfulness on the employer's part. See EEOC v. Kentucky State Police Dept., 80 F.3d 1086, 1097-98 (6th Cir.1996). The Second Circuit has gone so far as to state "it is ordinarily an abuse of discretion not to include pre-judgment interest in a back-pay award. . . ." Clarke v. Frank, 960 F.2d 1146, 1154 (2d Cir.1992). The Tenth Circuit holds that a court must determine whether the equities preclude an award. See U.S. Industries, Inc. v. Touche Ross & Co., 854 F.2d 1223, 1256-57 (10th Cir.1988). This Court can

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in whose favor it is rendered is entitled, even if the party has not demanded such relief in the pleadings." The Court will consider the motion.

conceive of situations where the balance of equities would favor denial of prejudgment interest, but this is not one of them. The relatively small amount of money involved should not be overly burdensome to the defendant.

Once the threshold issue of whether to award prejudgment interest is resolved, the parties appear to implicitly agree on two subsidiary points: (1) the appropriate interest rate is contained in 12 O.S. §727(A)(2), the Oklahoma statute regarding interest with respect to personal injury awards, and (2) prejudgment interest is appropriately awarded as to the entire amount of the judgment. The Court disagrees with the parties on both points. First, because plaintiff prevailed on a federal claim, prejudgment interest should be calculated under a federal standard. Cf. Goodman v. Heublein, Inc., 682 F.2d 44, 46 (2d Cir.1982) ("The award of prejudgment interest under the ADEA is governed by federal, not state, law.") Eldred v. Consol. Freightways, 907 F.Supp. 26, 28 (D.Mass.1995). Second, the rationale for awarding prejudgment interest--to make plaintiff whole--only applies to back pay, not compensatory damages. Cf. Scarfo v. Cabletron Systems, Inc., 54 F.3d 931, 961 (1st Cir.1995) (affirming district court's denial of prejudgment interest on front pay award). Therefore, prejudgment interest will only be granted as to the back pay award, which is $4,048.63.

The sole remaining issue is which federal interest rate to apply. Most courts have applied either (1) 28 U.S.C. §1961, on the ground prejudgment and postjudgment interest should be calculated on the same basis, or (2) the Internal Revenue Service adjusted

prime rate, 26 U.S.C. §6621, based on the practice of calculating interest on pay awards entered under the National Labor Relations Act. The Court finds persuasive those decisions holding the application of §1961 provides "the plaintiff is sufficiently, but not overly, compensated." Ware v. ABB Air Preheater, 1995 WL 574464 (W.D.N.Y.1995). The Tenth Circuit, in a non-Title VII case, stated "§ 1961(a) does not necessarily control the award of prejudgment interest in all cases, particularly where historically it has been disallowed." Frymire v. Ampex Corp., 61 F.3d 757, 773 (10th Cir.1995). Prejudgment interest has not historically been disallowed in cases of the present type; this Court takes the Frymire statement as sufficient guidance that selecting §1961 as the appropriate guide is within this Court's discretion.[2]

The Court will adopt the method of calculation used by the parties in their proposals, i.e., apply the single rate of interest to the designated amount, compounded annually. The amount of back pay is $4,048.63. The measuring date is April 19, 1994, the date this action was filed. At a rate of 5.60 percent, the accrued interest for the period of 4/19/94 to 4/18/95 is 226.72. Added to the initial amount of back pay, the resulting total is $4,275.35. The accrued interest on this amount from 4/19/95 to 4/18/96 is 239.42. With this addition, the total becomes $4,514.77. Finally, the accrued interest on this compounded amount is $252.83 for 365

[2]By stating §1961 does not necessarily control in all cases, the Tenth Circuit leaves open the inference the statute can appropriately be used in a situation committed to the district court's discretion, such as the present one.

days, or .69 per day. Plaintiff is only entitled to interest from 4/19/96 to 5/25/96, or 35 days. At .69 per day, the amount for the final period is $24.15. The resulting total of back pay and prejudgment interest is $4,538.92. With the $2,500 awarded as compensatory damages added, the total judgment is $7,038.92.

It is the Order of the Court that the motion of the plaintiff to alter or amend judgment (#61) is hereby granted. An Amended Judgment shall be entered in the amount of $7,038.92.

The application of the plaintiff to establish schedule for filing attorney's fee motion and bill of costs (#66) is hereby granted. Plaintiff shall file his applications for fees and costs on or before July 17, 1996. No additional extensions of time will be granted.

ORDERED this 2 day of July, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRY LEO TRAYNOR,

Plaintiff,

vs.

DIRECTOR, FEDERAL BUREAU OF PRISONS, UNITED STATES OF AMERICA, AND THE ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,

Defendants.

Case No. 96-C-348-C
and No. 93-CR-134-C

ORDER

Before the Court is a Writ of Habeas Corpus filed by the defendant, Terry Traynor. Traynor is currently in state custody serving the remaining portion of a ten year sentence. Traynor is requesting that the 21 month term of imprisonment imposed by this Court on March 25, 1994, be retroactively ordered to run concurrent with a term of imprisonment which was previously imposed in state court.[1] In the alternative, Traynor is seeking to have the sentence imposed herein vacated or set aside due to his alleged involuntary entry of a guilty plea as to the matters contained in the indictment.

At the time of sentencing herein, Traynor was being detained in state custody. On March 1, 1994, a Writ of Habeas Corpus Ad Prosequendum was issued by the Court to the federal marshal to deliver Traynor from state custody for his appearance before this Court. Traynor

[1] At the time Traynor committed the federal offense, Traynor was serving a 10 year suspended sentence that he received in the District Court of Garfield County and various other state convictions.

asserts that one of the factors he considered in entering into a guilty plea, was the assurance by his counsel that the federal sentence imposed would run concurrent to the sentence he was serving in state court. The sentence imposed by the Court was not ordered to run concurrent with his state sentence. At no time prior to sentencing did the defendant or his counsel make a request or voice an objection to the sentence being imposed in any other manner. The relevant provision regarding multiple terms of imprisonment contained in 18 U.S.C. § 3584(a) provides that multiple terms of imprisonment imposed at different times will run consecutive to each other unless the court orders that the terms are to run concurrently.

Moreover, at no time did the defendant advise the Court that he was allegedly conditioning his guilty pleas on his attorney's assurance that the terms of imprisonment would run concurrent. In fact, the defendant's sworn statement in his Petition to Enter Plea of Guilty, attests that the only advise of counsel that defendant was relying on was that upon his plea of guilty as to Count 1 of the indictment, that the government would move to dismiss Counts 2, 3, 4 and 5 of the indictment. The record reflects that those latter counts were in fact subsequently dismissed.

Since the defendant was in state custody at the time of sentencing, it was within the discretion of the state to relinquish custody to the federal government. If the state were at any time to relinquish custody to the federal authorities, then defendant's state term of imprisonment would run concurrently during defendant term in federal custody. Defendant advises that the Certificate of Parole Revocation issued by Governor David Walters directs that the remaining portion of defendant's state sentence is to run concurrent with the federal sentence. Consequently, this is a matter solely within the discretion and control of state officials.

It is therefore the order of the Court, that the Writ of Habeas Corpus, filed by Traynor on April 29, 1996 is hereby denied.

IT IS SO ORDERED this 2 day of July, 1996.

H. DALE COOK
Senior, United States District Judge

ENTERED ON DOCKET

DATE 7-5-96

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ERNEST L. WHITE; NELLIE MAE WHITE; COUNTY TREASURER, Washington County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma,

Defendants.

FILED

JUL 03 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 95-C 968H

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that this action shall be dismissed without prejudice.

Dated this 3RD day of July, 1996.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:
STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11138
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/esf

MW 6-24

ENTERED ON DOCKET
DATE 7-5-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. MARK W. VANN; BRENDA A. VANN aka BRENDA ANN VANN; CITY OF TULSA, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	FILED JUL 03 1996 Phil Lombardi, Clerk U.S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA Civil Case No. 95-C 1029H

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3rd day of July, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by Dick A. Blakeley, Assistant District Attorney; Defendant, **City of Tulsa, Oklahoma**, appears not, having previously filed its Disclaimer; and the Defendants, **Mark W. Vann and Brenda A. Vann aka Brenda Ann Vann**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **City of Tulsa, Oklahoma**, acknowledged receipt of Summons and Complaint via certified mail on October 19, 1995.

The Court further finds that the Defendants, **Mark W. Vann and Brenda A. Vann aka Brenda Ann Vann**, were served by publishing notice of this action in the Tulsa

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Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning February 15, 1996, and continuing through March 21, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Mark W. Vann and Brenda A. Vann aka Brenda Ann Vann,** and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Mark W. Vann and Brenda A. Vann aka Brenda Ann Vann.** The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma,** and **Board of County Commissioners, Tulsa County, Oklahoma,** filed their Answers on October 25, 1995, claiming no right, title, or interest in the subject property; that the Defendant, **City of Tulsa, Oklahoma, filed its** Disclaimer on November 6, 1995; and that the Defendants, **Mark W. Vann and Brenda A. Vann aka Brenda Ann Vann,** have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on September 28, 1993, the Defendant, **Brenda A. Vann** filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 93-3187W, which was discharged on January 14, 1993 and closed on April 18, 1994.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lots One (1) and Two (2), Block Two (2), LYNNWOOD ADDITION, a Subdivision to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.**

The Court further finds that on January 31, 1986, the Defendants, **Mark W. Vann and Brenda A. Vann,** executed and delivered to Mortgage Clearing Corporation their mortgage note in the amount of **$39,755.00,** payable in monthly installments, with interest thereon at the rate of 11 percent (11%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, **Mark W. Vann and Brenda A. Vann,** executed and

delivered to Mortgage Clearing Corporation their mortgage dated January 31, 1986, covering the above-described property. Said mortgage was recorded on February 5, 1986, in Book 4923, Page 354, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1988, Mortgage Clearing Corporation assigned the above-described mortgage note and mortgage to Triad Bank, N.A. This Assignment of Mortgage was recorded on July 18, 1989, in Book 5195, Page 644, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 4, 1993, Triad Bank, N.A. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington D.C., its successors and assigns. This Assignment of Mortgage was recorded on March 8, 1993, in Book 5482, Page 652, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 10, 1993, the Defendants, **Mark W. Vann and Brenda A. Vann,** entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, **Mark W. Vann and Brenda A. Vann aka Brenda Ann Vann,** made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Mark W. Vann and Brenda A. Vann aka Brenda Ann Vann,** are indebted to the Plaintiff in the principal sum of $47,000.00, plus interest at the rate of 11 percent per annum from August 1, 1994 until judgment, plus interest thereafter

at the legal rate until fully paid, and the costs of this action in the amount of $274.88 for publication fees.

The Court further finds that the Defendants, **County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma,** claim no right, title or interest in the subject real property.

The Court further finds that the Defendant, **City of Tulsa, Oklahoma,** disclaims any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Mark W. Vann and Brenda A. Vann aka Brenda Ann Vann,** in the principal sum of $47,000.00, plus interest at the rate of 11 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.89 percent per annum until paid, plus the costs of this action in the amount of **$274.88** for publication fees, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma,** claim no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **City of Tulsa, Oklahoma, disclaims** any right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the **United States** Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the

Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
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(918) 581-7463

DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 1029H

LFR/esf

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of Rural Housing Service,
formerly Farmers Home Administration,

Plaintiff,

v.

PATRICIA G. LEDBETTER, a single person;
DWAYNE GILBERT aka Gary D. Gilbert;
KAY GILBERT aka Glenda K. Gilbert;
COUNTY TREASURER, Pawnee County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Pawnee County, Oklahoma,

Defendants.

CIVIL ACTION NO. 96-CV-171-H

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3RD day of July, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, **County Treasurer, Pawnee County, Oklahoma, and Board of County Commissioners, Pawnee County, Oklahoma**, appear by Alan B. Foster, Assistant District Attorney, Pawnee County, Oklahoma; the Defendants, **Dwayne Gilbert aka Gary D. Gilbert and Kay Gilbert aka Glenda K. Gilbert**, appear not, having previously filed their Disclaimers; and the Defendant, **Patricia G. Ledbetter, a single person**, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, **Patricia G. Ledbetter, a single person**, was served with Summons and

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Complaint on March 20, 1996 by certified mail, return receipt requested, delivery restricted to the addressee.

It appears that the Defendants, **County Treasurer, Pawnee County, Oklahoma, and Board of County Commissioners, Pawnee County, Oklahoma**, filed their Answer on or about March 15, 1996; that the Defendants, **Dwayne Gilbert aka Gary D. Gilbert and Kay Gilbert aka Glenda K. Gilbert**, filed their Disclaimers on March 26, 1996; and that the Defendant, **Patricia G. Ledbetter, a single person**, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain promissory note and for foreclosure of a mortgage securing said promissory note upon the following described real property located in Pawnee County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot 26, Block 1, Crestview Addition to the City of Cleveland, Pawnee County, State of Oklahoma, according to the recorded plat thereof, subject, however, to all valid outstanding easements, rights-of-way, mineral leases, mineral reservations, and mineral conveyances of record.**

The Court further finds that on June 9, 1980, Patricia G. Ledbetter executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Rural Housing Service, a promissory note in the amount of $35,500.00, payable in monthly installments, with interest thereon at the rate of 11 percent per annum.

The Court further finds that as security for the payment of the above-described note, Patricia G. Ledbetter, a single person, executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Rural Housing

Service, a real estate mortgage dated June 9, 1980, covering the above-described property, situated in the State of Oklahoma, Pawnee County. This mortgage was recorded on June 9, 1980, in Book 250, Page 359, in the records of Pawnee County, Oklahoma.

The Court further finds that on June 9, 1980, May 12, 1982, June 7, 1984, April 12, 1985, March 17, 1986, June 3, 1987, May 3, 1988, May 3, 1989, March 23, 1990, May 14, 1991, March 31, 1992, and April 10, 1993, Patricia G. Ledbetter executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Rural Housing Service, Interest Credit Agreements pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on May 14, 1991, Patricia G. Ledbetter executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Rural Housing Service, a Reamortization and/or Deferral Agreement pursuant to which the entire debt due on that date was made principal.

The Court further finds that the Defendant, **Patricia G. Ledbetter, a single person**, made default under the terms of the aforesaid note, mortgage, interest credit agreements and reamortization and/or deferral agreement by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Patricia G. Ledbetter, a single person**, is indebted to the Plaintiff in the principal sum of $27,893.92, plus accrued interest in the amount of $4,916.53 as of December 7, 1995, plus interest accruing thereafter at the rate of 11 percent per annum or $8.4064 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of $36,012.00, plus

interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of $8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, **County Treasurer and Board of County Commissioners, Pawnee County, Oklahoma**, have a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $209.41, plus penalties and interest, for the year 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, **County Treasurer and Board of County Commissioners, Pawnee County, Oklahoma**, have liens on the property which is the subject matter of this action by virtue of personal property taxes in the total amount of $53.41 which became liens on the property as of 1994 ($29.98) and 1995 ($23.43). Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, **Dwayne Gilbert aka Gary D. Gilbert and Kay Gilbert aka Glenda K. Gilbert**, disclaim any right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Rural Housing Service, formerly Farmers Home Administration, have and recover judgment against the Defendant, **Patricia G. Ledbetter, a single person,** in the principal sum of $27,893.92, plus accrued interest in the amount of $4,916.53 as of December 7, 1995, plus interest accruing thereafter at the rate of 11 percent per annum or $8.4064 per day until judgment, plus interest thereafter at the current legal rate of 5.89 percent per annum until paid, and the further sum due and owing under the interest credit agreements of $36,012.00, plus interest on that

sum at the current legal rate of 5.89 percent per annum from judgment until paid, plus the costs of this action in the amount of $8.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **County Treasurer and Board of County Commissioners, Pawnee County, Oklahoma**, have and recover judgment in the amount of $209.41, plus penalties and interest, for ad valorem taxes for the year 1995, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **County Treasurer and Board of County Commissioners, Pawnee County, Oklahoma**, have and recover judgment in the total amount of $53.41 plus penalties and interest for personal property taxes for the years 1994 ($29.98) and 1995 ($23.43), plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Dwayne Gilbert aka Gary D. Gilbert and Kay Gilbert aka Glenda K. Gilbert**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **Patricia G. Ledbetter, a single person**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Defendants, County Treasurer and Board of County Commissioners, Pawnee County, Oklahoma, for ad valorem taxes;

Third:
In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:
In payment of the judgment rendered herein in favor of the Defendants, County Treasurer and Board of County Commissioners, Pawnee County, Oklahoma, for personal property taxes.

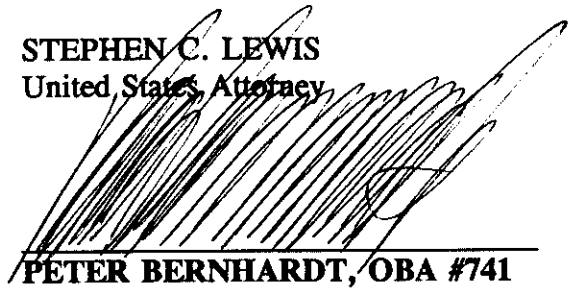
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

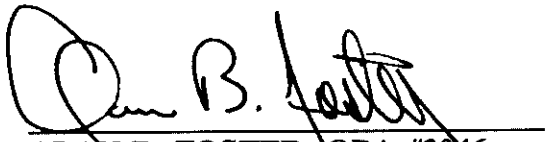
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



ALAN B. FOSTER, OBA #3046
Assistant District Attorney
Pawnee County Courthouse - Room 301
500 Harrison
Pawnee, Oklahoma 74058
(918) 762-2555
Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Pawnee County, Oklahoma

Judgment of Foreclosure
Case No. 96-CV-171-H (Ledbetter)

PB:cas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KATHY DENISE POGUE,

Plaintiff,

v.

DAVID R. PARKER,

Defendant.

Case No. 96-C-303-H

ORDER

This matter comes before the Court on Plaintiff's Motion to Dismiss (Docket #3).

Plaintiff brought this action on April 18, 1996. Four days later, on April 22, 1996, Plaintiff advised the Court by letter that she had settled her suit with Mr. Parker and wished to have her claim "canceled out." (Docket #3). The Court construes this as a motion to dismiss the instant action.

Rule 41(a)(1) of the Federal Rules of Civil Procedure provides that a plaintiff may dismiss an action "by filing a notice of dismissal at any time before service by the adverse party of an answer ot of a motion for summary judgment, whichever first occurs." Defendant has received service, but has not filed an answer or a responsive pleading. The Court thus concludes that dismissal pursuant to Fed. R. Civ. P. 41(a)(1) is appropriate.

Accordingly, Plaintiff's Motion to Dismiss (Docket #3) is granted. This action is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 3RD day of July, 1996.

Sven Erik Holmes
United States District Judge

4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY DONAHUE,

Plaintiff,

v.

UNITED STATES OF AMERICA, ex rel. UNITED STATES POSTAL SERVICE,

Defendant.

Case No. 96-C-252-H

ORDER

This matter comes before the Court on Defendant's Motion to Dismiss (Docket #3).

Plaintiff filed this action on April 1, 1996, alleging that she sustained personal injuries when she was struck by a vehicle owned by the United States Postal Service on or about September 19, 1992. A plaintiff may bring a suit against the federal government or an agency thereof only where the government has explicitly waived its sovereign immunity. The Federal Tort Claims Act ("FTCA") is a limited waiver of sovereign immunity, rendering the federal government liable to the same extent as a private party for certain torts of federal employees acting in the scope of their employment. The provisions of the FTCA must be strictly construed, Pipkin v. United States Postal Serv., 951 F.2d 272 (10th Cir. 1991), and failure to bring an action within the time specified under the FTCA deprives the district court of jurisdiction, Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588 (9th Cir. 1990).

8

Plaintiff attempts to assert a cause of action sounding in tort against the federal government,[1] thus this action is governed by the limitations period set forth in the FTCA. The FTCA provides in applicable part:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b). Even if a plaintiff files her administrative complaint within the two-year statutory period, her suit is not timely filed if she does not file the action in district court within six months of the denial of her claim. See Willis v. United States, 719 F.2d 608 (2d Cir. 1983).

The incident giving rise to this action occurred on September 19, 1992. Plaintiff timely submitted her claim to the United States Postal Service on September 16, 1994. However, such claim was denied by the agency on December 29, 1994 and Plaintiff did not bring the instant action until April 1, 1996, well outside the six-month statute of limitations period.

Plaintiff contends that the statute of limitations period was tolled by virtue of the fact that the case was previously filed and dismissed in the United States District Court for the Northern District of Oklahoma. Donahue v. United States Postal Service, Case No. 95-C-240-B (N.D. Okl. Jan. 31, 1996). The district court dismissed the previous action without prejudice when Plaintiff failed to serve the proper party within 120 days of the filing of the case. Plaintiff now contends that the Oklahoma saving statute, 12 Okla. Stat. Ann. § 100, allows her an additional year from the date of

---

[1]Plaintiff also names the United States Postal Service as a defendant in this action. However, a federal agency cannot be sued directly under the Federal Tort Claims Act. See 28 U.S.C. § 1346(b); 28 U.S.C. §2679(a); Bor-Son Bldg. Corp. v. Heller, 572 F.2d 174 (8th Cir. 1978). The Court therefore can only proceed as if the United States is the sole defendant.

dismissal of the first action to re-file this case. However, the Tenth Circuit has specifically addressed this issue and held that the Oklahoma saving statute does not operate in the FTCA context. Pipkin, 951 F.2d at 274-75. The Tenth Circuit held:

> The general rule is that a court looks to state law to define the time limitation applicable to a federal claim only when "Congress has failed to provide a statute of limitations for a federal cause of action." Statute 28 U.S.C. § 2401(b) states that an FTCA claim "shall be forever barred unless [the] action is begun within six months after the date of mailing of final denial of the claim by the agency to which it was presented." Congress has expressly stated the applicable limitation period for FTCA claims and reference to state law is therefore inappropriate.

Id. (citations omitted). Upon this basis, the Court concludes that the Oklahoma saving statute does not apply to the instant action. Therefore, Plaintiff's claim is barred by the relevant statute of limitations, and the Court does not have jurisdiction over this matter.

Accordingly, Defendant's Motion to Dismiss (Docket #3) is hereby granted.

IT IS SO ORDERED.

This 2ND day of July, 1996.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAMELA S. PILGRIM,

Plaintiff,

v.

No. 95-C-543-M

SHIRLEY S. CHATER, Commissioner of Social Security,

Defendant.

ADMINISTRATIVE CLOSING ORDER

This case was previously remanded to the Commissioner of Social Security ("Commissioner") under sentence six of 42 U.S.C. §405(g). In accordance with N.D. LR 41, it is hereby ordered that the Clerk administratively close this action. This case may be reopened for final determination upon application of either party once the proceedings before the Commissioner are complete.

IT IS SO ORDERED.

Dated this 1ST day of ~~June~~ JULY, 1996.

Frank H McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JEAN A. RODGERS aka JEAN RODGERS; VETERINARY PRODUCTS, INC.; LONGVIEW LAKE ASSOCIATION, INC.; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET
DATE JUL 03 1996

FILED
JUL 2 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Case No. 95-C 1075B

ORDER OF SALE

UNITED STATES OF AMERICA TO: U.S. Marshal for the Northern District of Oklahoma

On June 19, 1996, the United States of America recovered a judgment against the Defendant, **Jean A. Rodgers**, in the above-styled action to enforce a mortgage lien upon the following described property:

> Lot 12, Block 9, Longview Lake Estates, Blocks 1 through 14, inclusive, an addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The amount of the judgment is the sum of $112,095.68, plus interest at the rate of 9 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until fully paid, plus the costs of this action accrued and accruing. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them

are barred from claiming any right, title, interest, and equity in the property. The judgment provides that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the property according to Plaintiff's election with or without appraisement and to apply the proceeds to the payment of the costs of the sale; to the Defendant, County Treasurer, Tulsa County, Oklahoma, for ad valorem taxes; to the judgment of Plaintiff, United States of America; and to the Defendant, County Treasurer, Tulsa County, Oklahoma, for personal property taxes. Any residue is to be paid to the Court Clerk to await further order of this Court.

THEREFORE, this is to command you to proceed according to law, to advertise and sell, with appraisement, the above-described real property and apply the proceeds thereof as directed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 2nd day of July, 1996.

PHIL LOMBARDI, Clerk,
United States District Court for
the Northern District of Oklahoma

By _____
Deputy

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHNATHAN R. FREEMAN,
JOHN NORTH, and
ISRAEL SALDIVAR,

Plaintiffs,

v.

SHERIFF STANLEY GLANZ,
UNDERSHERIFF BILL THOMPSON,
CHIEF JIM HELM,
DEP. BOB MACKENCHNEY,
JACK PUTNAM,

Defendants.

No. 95-C-252-B

REPORT & RECOMMENDATION

Plaintiffs filed an action against the above-named Defendants on March 20, 1995. By order dated April 5, 1995, United States Magistrate Judge Jeffery S. Wolfe ordered Plaintiffs to supplement their complaint by notifying the Court of the specific constitutional rights, of Plaintiffs, which were violated by the actions of the Defendants. By Order dated April 25, 1995, United States Magistrate Judge Jeffrey S. Wolfe granted Defendants' Motion to Stay the proceedings. A Motion to Dismiss the Action or in the Alternative for Summary Judgment was filed by Defendants on June 8, 1995.

On March 1, 1996, an Order lifting the stay was filed. In addition, Plaintiffs were ordered to file an amended complaint, and to file a response to Defendants' Motion to Dismiss by May 15, 1996.

As of May 15, 1996, Plaintiffs had not filed an amended complaint or a response to Defendants' Motion to Dismiss. By Order dated May 20, 1996, Plaintiffs were granted until June 28, 1996 to show cause as to why this case should not be dismissed for failure to respond to Defendants' Motion to Dismiss and for failure to file an amended complaint. Plaintiffs were advised in the Order that the failure of Plaintiffs to show cause by June 28, 1996 could result in the dismissal of this action.

As of this date, Plaintiffs have failed to file an amended answer or a response to Defendant's Motion to Dismiss. Therefore, the United States Magistrate Judge recommends that the District Court **DISMISS** Plaintiffs' action, without prejudice, due to Plaintiffs' failure to prosecute. See Fed. R. Civ. P. 41(b).

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of the service of this notice. **Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's order.** See Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 2 day of July 1996.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

COMPUTERIZED AUTOMATION TECHNOLOGIES, INC., an Oklahoma corporation, and FONET, INC., an Oklahoma corporation,	)	
Plaintiff,	)	
v.	)	Case No. 95 C 322 H
JEFFREY D. PIOTROWSKI, an individual, GREGORY A. MORRIS, an individual, TECH UNLIMITED, INC., an Oklahoma corporation BARON SERVICES, INC., an Alabama corporation, BARONTECH, L.L.C., an Alabama limited liability company,	)	
Defendants,	)	
v.	)	
DICK FREEMAN, an individual,	)	
Additional Counter-Defendant.	)	

ORDER OF DISMISSAL

The Court has before it for consideration the Joint Motion for Dismissal, and for Approval of Settlement Agreement, filed by all parties to this case.

The Joint Motion has been filed pursuant to the terms of a Settlement Agreement entered into by all parties for the resolution of this case. A copy of that Settlement Agreement is attached hereto as Exhibit "A", and its terms are incorporated herein by reference and shall become a part of this Order as though they were recited herein. The Settlement Agreement and the original signature pages for all the signatories to that Settlement Agreement, on behalf

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of all the parties, are attached hereto for filing with the Clerk. The Court has reviewed the Settlement Agreement and approves its terms.

In accordance with the terms of the Settlement Agreement and the Joint Motion for Dismissal

IT IS HEREBY ORDERED that Count III of the Second Amended Complaint, for copyright infringement, and the Second Claim for Relief of the Amended Counterclaims, for patent infringement, are dismissed with prejudice. The remaining claims alleged in the Second Amended Complaint and the Amended Counterclaims are dismissed without prejudice.

The Court retains jurisdiction to enforce all terms of the Settlement Agreement and this Order of Dismissal.

IT IS SO ORDERED this 2ND day of July, 1996.

UNITED STATES DISTRICT JUDGE

ORIGINAL

SETTLEMENT AGREEMENT

Computerized Auto, et al v. Piotrowski, et al
Case No. 95-CV-322-H
United States District Court, Northern District of Oklahoma

1. Plaintiffs, and their related persons and entities covenant not to sue or take action to invalidate Defendants' patent, and Defendants, and their related entities covenant not to sue or take action to invalidate any of Plaintiffs' patents to issue from currently pending applications. ~~, except as a counterclaim once sued by Plaintiff(s).~~

2. Defendants, and their related persons and entities covenant not to sue Plaintiffs for infringement of their patent. ~~The Parties stipulate, and the court will determine, in the order of dismissal, that there has been no infringement by Plaintiffs of Defendants' patent.~~

3. Plaintiffs, and their related persons and entities covenant not to sue Defendants or their related entities for infringement of its patents or copyrights in place, or which issue from currently pending applications for any ~~applications~~ uses involving transmissions that originate with a Consumer T.V. Provider ~~Industries~~ (broadcast, cable, satellite, phone line, Internet, etc.), or for any applications used only to transmit weather data.

4. The parties will jointly file a stipulation for dismissal without prejudice, and obtain an order of dismissal without prejudice, with respect to all claims except Defendants' counterclaim for infringement of their patent, and Plaintiffs' claim for copyright infringement, which shall be dismissed with prejudice.

5. All parties, and their related persons and entities acknowledge and agree to be bound by an explicit covenant of good faith and fair dealing in connection with the implementation and enforcement of this Settlement Agreement.

6. The court will retain continuing jurisdiction to enforce this settlement agreement, and the parties agree that any action to enforce this agreement shall be brought only in the Northern District of Oklahoma, and shall be initiated by Motion to Enforce Settlement Agreement, filed under this case number. The parties agree that the action of the District Court on such a motion will be final and binding, and that no appeal can be taken.

7. The parties agree that before any Motion to Enforce Settlement Agreement will be heard and decided on the merits, they will participate in good faith in a supplemental settlement conference, conducted pursuant to the Settlement

EXHIBIT "A"

Conference Order currently in place.

8. Each party will bear his/its own costs and fees.

9. The benefit of the respective covenants not to sue (as set forth in paragraphs 1-3) do not run to purchasers, licensees, or permissive users of the patents or copyrights referred to~~, who manufacture or market products,~~ but do run to the benefit of all parties hereto and purchasers of products sold by the parties.

10. The parties and their related persons and entities agree not to sell or grant, to a now non-related entity, an exclusive license to any of the patents or copyrights referred to in paragraphs 1-3 above for a period of two years. Further, if an agreement or contract to sell or exclusively license (to a now non-related entity) any of those patents or copyrights is entered into subsequent to that two year period, each party and their related persons and entities agrees to grant to each other party a right of first refusal, at the agreed or contract price. Reasonable and timely notice of such contemplated sale or exclusive license must be provided, and those parties so noticed will have ~~10~~ 30 ~~business~~ days in which to exercise the right of first refusal by tender of the contract price.

11. Mr. Piotrowski's state court case will be dismissed with prejudice.

12 All "proprietary information" as defined in the Protective Order entered in this case will be destroyed or returned to the producing party. The identification of those given access to such information shall be given to the producing party, and counsel of record shall provide the producing party with a certificate of compliance with this provision.

13. ~~A press release, containing language approved by all parties, shall be jointly issued announcing the resolution of this litigation.~~ No press release shall issue regarding the resolution of this litigation, but no confidentiality provision applies either.

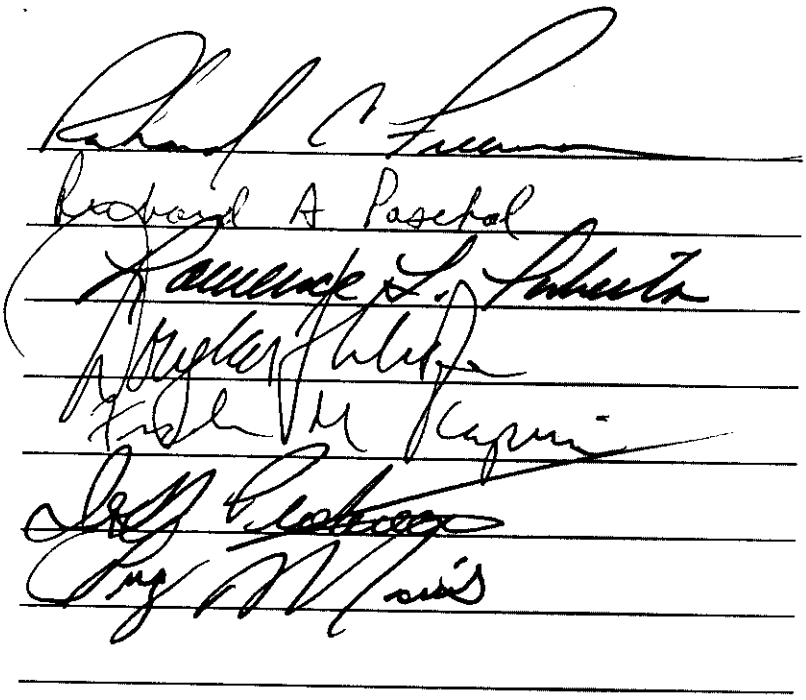
Dated June 19th, 1996

APPROVED: Contingent upon Approval of Bob Barton St. and Dianna Wood (as relating all insurance issues)

Larry R Watson

AGREED:

Michael H. Freeman



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INHOFE & WALLER

A PROFESSIONAL CORPORATION

LAWYERS

907 PHILTOWER BUILDING
427 SOUTH BOSTON AVENUE
TULSA, OKLAHOMA 74103-4114
(918) 583-4300
FAX (918) 583-7100

June 25, 1996

TRANSMITTED VIA HAND DELIVERY

The Honorable John Leo Wagner
United States Magistrate Judge
33 West 4th Street
Tulsa, OK 74103

Re: Computerized Automation Technologies, Inc. and FoNet, Inc. v. Jeffrey D. Piotrowski, Gregory A. Morris, Tech Unlimited, Inc., Baron Services, Inc., and BaronTech, L.L.C., U.S.D.C., Case No. 95-C-322-H (N.D. Okla.)

Dear Judge Wagner:

In regard to the Settlement Agreement that you negotiated last Tuesday and Wednesday, June 18 - 19, I am enclosing the original, blue-ink signature of Robert O. Baron, Sr.

It is my understanding that you have retained the original signatures of the persons who were available to sign the Settlement Agreement late in the evening on Wednesday, June 19, and that you have since received the original signature on the Settlement Agreement, from Mr. Paschal, of a representative of Chubb Insurance.

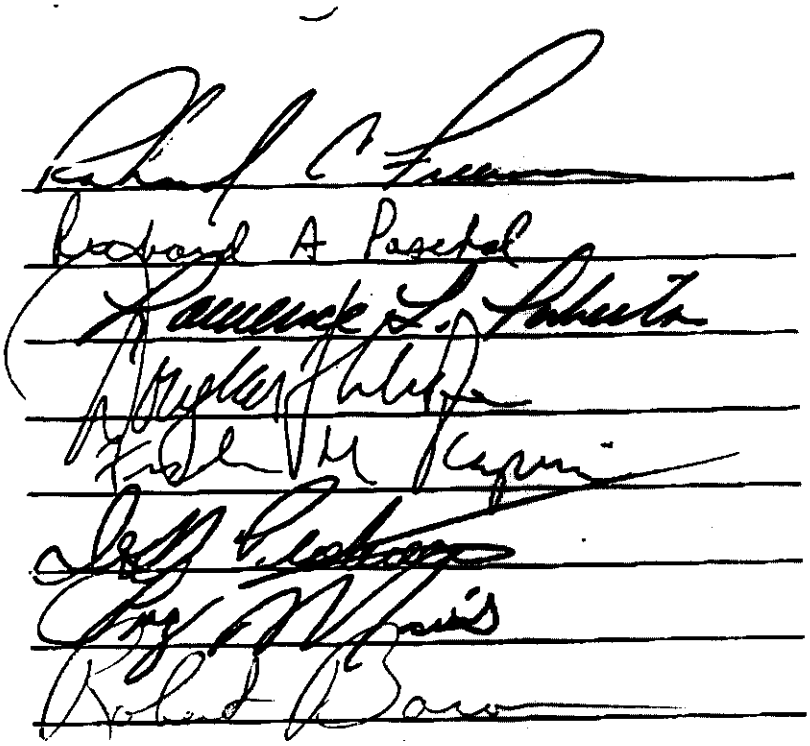
Mr. Paschal and I are now working on a form for the Order of Dismissal. We contemplate that the Settlement Agreement and all the original signature pages will be attached to that Order for filing with the Court. We will provide copies to you of our joint effort, in regard to the Order of Dismissal, within the next few days.

Again, thank you for your heartfelt efforts last week.

Yours very truly,

Douglas L. Inhofe

cc: Richard A. Paschal, Esq. (w/encl.)



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LIPE, GREEN, PASCHAL & TRUMP
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ATTORNEYS AT LAW
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LARRY B. LIPE
JAMES E. GREEN, JR.
RICHARD A. PASCHAL
TIMOTHY T. TRUMP
MELODIE FREEMAN-BURNEY
MARK E. DREYER
DONALD L. HALL, JR.
RICHARD J. HARRIS

WRITER'S DIRECT DIAL NUMBER
(918) 599-1907

June 25, 1996

VIA HAND DELIVERY

John Leo Wagner
United States Magistrate Judge
3358 U. S. Courthouse
333 West 4th Street
Tulsa, OK 74103

Re: Computerized Automation Technologies, Inc., an Oklahoma corporation, and Fonet, Inc., an Oklahoma corporation vs. Jeffery D. Piotrowski, et al.
USDC Case No. 95 C 322H

Dear Judge Wagner:

Pursuant to your request, enclosed please find a signature page containing the original signature of Diane Wood on the settlement agreement entered into in the above referenced case.

Please let me know if you need any further information from me.

Sincerely,

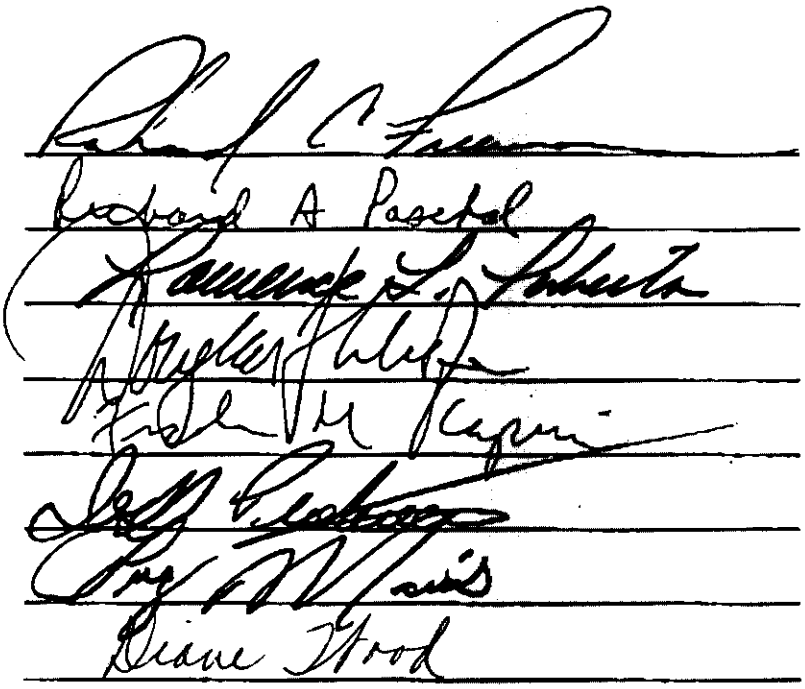
LIPE, GREEN, PASCHAL & TRUMP, P.C.

Richard A Paschal

Richard A. Paschal

RAP/lc
Enclosure
cc: Douglas Inhofe (w/encl.)
Laurence Pinkerton (w/encl.)

lc069627



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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 2 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TULSA RIG IRON, INC., an Oklahoma corporation,

Plaintiff,

vs.

FLUID SYSTEMS, INC., a Louisiana corporation,

No. 95-CV-1004-BU

ENTERED ON DOCKET

DATE JUL 3 1996

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Tulsa Rig Iron, Inc. and Defendant, Fluid Systems, Inc., pursuant to Fed. R. Civ. Pro. 41(a), hereby stipulate and agree to the dismissal with prejudice of said cause. Each party shall bear its own costs, expenses, and attorney fees. The District Court shall retain jurisdiction to enforce the terms of a settlement agreement.

E. Scott Pruitt, OBA # 15828
Carter & Pruitt, P.A.
CityPlex Towers, Suite 4550
2448 East 81st Street
Tulsa, OK 74137-4248
(918) 491-0114

ATTORNEYS FOR PLAINTIFF
TULSA RIG IRON, INC.

Randall G. Vaughan, OBA #11554
PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR
900 ONEOK Plaza
Tulsa, OK 74103
(918) 581-5500

ATTORNEYS FOR DEFENDANT
FLUID SYSTEMS, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 1 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SAM KEIRSEY and KAY ORNDORFF,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Case No. 92-C-345-E** H
	)	
DREW DIAMOND, BOBBY BUSBY, CAROLYN KUSLER, CHARLES JACKSON, and THE CITY OF TULSA, OKLAHOMA, a municipal corporation,	)	ENTERED ON DOCKET JUL 0 2 1996. DATE
	)	
Defendants.	)	

STIPULATION OF DISMISSAL

COMES NOW the cross-claimant, Carolyn M. Kusler, and the cross-defendant, the City of Tulsa, by and through its attorney Michael C. Romig, and as all matters in dispute between the said parties to the above-captioned cause having been satisfactorily compromised and settled:

IT IS STIPULATED AND AGREED by and between said parties, that the cross-claim filed by Carolyn Kusler against the City of Tulsa be dismissed with prejudice, with each party to bear its own costs and expenses;

WHEREFORE, the said parties pray that the Court enter an Order of Dismissal, dismissing the cross-complaint of Carolyn Kusler, with prejudice.

Carolyn Kusler, pro se
2706 Raintree Circle
Sapulpa, Oklahoma 74066
(918) 227-2903

City of Tulsa, Oklahoma

Michael C. Romig, OBA 37739
Sr. Assistant City Attorney
200 Civic Center, Rm. 316
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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 2 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,
on behalf of Rural Housing and Community Development Service, formerly Farmers Home Administration,

Plaintiff,

v.

JOHN S. BENGE;
PATRICIA A. BENGE;
COUNTY TREASURER, Delaware County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS, Delaware County, Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE JUL 0 2 1996

CIVIL ACTION NO. 95-C-914-E

ORDER VACATING JUDGMENT OF FORECLOSURE AND DISMISSING WITHOUT PREJUDICE

This matter comes on before the Court on this 1st day of July, 1996, upon the Motion of the United States of America, for an Order of this Court vacating the Judgment of Foreclosure entered in this case on the 25th day of January, 1996, and dismissing this action without prejudice. The Court, having considered the motion and the records and files in this case, and being fully advised in the premises, finds that good cause has been shown for the relief sought and that the motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Judgment of Foreclosure entered in this case on January 25, 1996, be, and the same is hereby vacated, set aside and held for naught.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this action be, and the same is hereby dismissed without prejudice.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
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Order Vacating Judgment Of Foreclosure And Dismissing Without Prejudice

Case No. 95-C-914-E

PB:cas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBIN BURCH,

Plaintiff,

vs.

MAZZIO'S CORPORATION,

Defendant.

Case No. 95-C-1111-E

JUDGMENT

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment and denying Plaintiff's Motion for Partial Summary Judgment, the Court hereby enters judgment in favor of the Defendant Mazzio's Corporation and against the Plaintiff Robin Burch. Plaintiff shall take nothing of her claim. Costs may be awarded upon proper application.

Dated, this 28th day of June, 1996.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBIN BURCH,

Plaintiff,

vs.

MAZZIO'S CORPORATION,
a corporation,

Defendant.

No. 95-C-1111E

ORDER

Before the Court, pursuant to Fed. R. Civ. P. 56, are Defendant's motion for summary judgment (Docket 5), and Plaintiff's motion for partial summary judgment (Docket 10). Defendant's motion is granted and Plaintiff's motion is denied.

I. UNDISPUTED FACTS

Defendant, MAZZIO'S CORPORATION (Mazzio's) employed Plaintiff, Robin Burch (Burch) between June 1, 1994 and June 10, 1994. On June 8, 1994, Mazzio's required Burch and other employees to attend a driver's safety meeting. Mazzio's suggested that employees car-pool to this meeting and Burch rode with Larry Brooks (Brooks), a coworker she met a few days earlier.

Brooks sat next to Burch at the driver's safety meeting where he placed his arm on the back of her chair, and also rubbed her arm. These gestures caused Burch to become uncomfortable and she responded by attempting to place distance between herself and Brooks by first leaning forward, and then, moving her chair.

On their way home from the meeting, Brooks placed his hand upon Burch's hand; in a friendly gesture, she responded by "patting" his hand. When they arrived at her home, Brooks grabbed Burch and attempted to kiss her; however, as Burch resisted, Brooks was only able to kiss her on the chin. After she exited the vehicle and Brooks departed, Burch contacted her manager, Chris Wyre (Wyre), and complained about Brook's conduct. Wyre, upon learning of the incident, told Burch he would take care of the problem.

The following day, Wyre asked Burch to meet with Mary Woodard (Woodard), an area general manager for Mazzio's. Burch met with Woodard and described the previous day's events. Later that day, Woodard, along with a security supervisor for Mazzio's, interviewed Brooks. During this interview, Brooks admitted that he kissed Burch, and Woodard immediately terminated him. That evening, when Woodard informed Burch that she fired Brooks, Burch indicated satisfaction with the termination and did not request any further action by Woodard.

The following day, June 10, 1994, Burch resigned from her employment with Mazzio's. Burch stated that because she feared resentment from employees that she and Brooks worked with, she decided to resign when Mazzio's would not transfer her to another store.[1] However, the next day Burch contacted Woodard and, in an emotional discussion, asked for her job back. As a result of this conversation, Woodard discussed the possibility of re-hiring Burch with other supervisory personnel of Mazzio's. Woodard subsequently denied Burch's request.

II. PROCEDURAL HISTORY

[1].Burch also indicates that she believed returning to work at the same store would constantly remind her of Brooks' "assault." Additionally, Burch states that Mazzio's would not give her time off to recover from the incident.

On July 22, 1994, Burch filed a petition in the District Court for Tulsa County, Case No. CJ-94-3026, against Mazzio's stating four causes of action: (I) Intentional violation of Oklahoma public policy; (II) Intentional infliction of emotional distress; (III) Assault; and (IV) Malicious disregard of the known rights of Burch. (App. Of Ex. To Def.'s Br. In Supp. Of Mot. For Summ. J., Ex. D, Docket 7). On May 3, 1995, Mazzio's filed a motion for summary judgment, and on October 24, 1995, the court entered judgment, as a matter of law, for Mazzio's.

On July 27, 1995, prior to the court sustaining Mazzio's motion for summary judgment, Burch received a "right to sue" letter from the E.E.O.C. Consequently, Burch filed a second petition in the District Court for Tulsa County, Case No. CJ-95-4061, which alleged four claims against Mazzio's arising under Title VII of the Civil Rights Act of 1964: (I) Intentional discrimination, harassment, or retaliation; (II) Intentional infliction of emotional distress; (III) Assault ; and (IV) Malicious disregard of the known rights of Burch. (App. Of Ex. To Def.'s Br. In Supp. Of Mot. For Summ. J., Ex. I, Docket 7). This second action, successfully removed by Mazzio's, is now before this Court (Docket 1).

On March 27, 1996, Mazzio's submitted a motion for summary judgment (Docket 5) and argues that, because of the previous judgment, Burch is precluded from litigating the second cause of action under principles of *res judicata*. Additionally, Mazzio's claims that if Burch is not precluded from litigating the case, the Court should sustain its motion for summary judgment because Burch has not established a prima facie case under Title VII. Conversely, on April 3, 1996, Burch also submitted a motion for summary judgment (Docket 10). Burch asks the Court to enter judgment on her behalf on the issue of liability.

III. ANALYSIS

A. Res judicata

Mazzio's initially claims that Burch's current case is barred under the principles of *res judicata* because of the full faith and credit principles of 28 U.S.C. § 1738. "Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgment emerged." Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 (1982) (citing 28 U.S.C. § 1738). Additionally, the Kremer Court specifically determined that § 1738 applies to actions arising under Title VII. Id. at 473. Under Kremer, this Court is required to give preclusive effect to Burch's state court judgment if two tests are met: (1) Oklahoma Courts would give Burch's previous judgment preclusive effect; and (2) Burch had "a full and fair opportunity to litigate" her claim in the state proceeding. Id. at 481-82.

Kremer's first inquiry requires the Court to turn to the preclusion rules of Oklahoma. Id. at 482. The Oklahoma Supreme Court explained that "[t]he doctrine of *res judicata*, or claim preclusion, operates to bar the relitigation of issues by the parties or their privies which were or could have been litigated in an action which resulted in a final judgment on the merits." Carris v. John R. Thomas & Assoc., P.C., 896 P.2d 522, 527 (Okla. 1995). However, a subsequent law suit will be barred by *res judicata* only if the following elements are met: "1) an identity of subject matter, of the parties or their privies . . . and their cause of action; 2) the court which heard the original action, must have been one of competent jurisdiction; and 3) the judgment rendered must have been a judgment on the merits of the case and not upon purely technical grounds." Id.

Applying Carris, the Court must first determine whether the Burch's two cases have an

identity of subject matter. Oklahoma follows a "same evidence" test in determining whether subject matter identity exists. Explaining this test, the Oklahoma Supreme Court observed:

> A judgment is a bar if the cause of action [is] the same, though the form [is] different. The cause is the same when the same evidence will support both actions; or, rather, the judgment in the former action will be a bar, provided the evidence necessary to sustain the judgment for the plaintiff in the present action would have authorized a judgment for him in the former. Lindhauer v. Oklahoma City, 340 P.2d 221, 222-23 (Okla. 1959) (citation omitted).

Consequently, an identity of subject matter exists if the evidence necessary for judgment in the Burch's current lawsuit would have allowed judgment for her in the former.

In her former lawsuit, Burch's state claims were based on her assertion of a violation of Oklahoma public policy under Burk v. K-Mart, 770 P.2d 24 (1989). In Burk, the Court recognized a narrow public policy exception to the employment at will doctrine. This exception allows a plaintiff to challenge a dismissal when an employer has acted contrary to "a clear mandate of public policy as articulated by constitutional, statutory, or decisional law." Id. at 28. Furthermore, the Burk Court recognized several existing statutory exceptions to the at will doctrine. Id. at 26 n.4. In her arguments before the state court, Burch relied upon one of these exceptions, a violation of Okla. Stat. tit. 25 § 1302, Oklahoma's statute against employment discrimination; however, Burch also relied on a violation of Title VII.

Initially, the Court observes that the Oklahoma statute is quite similar to Title VII.[2] Burch's

[2] Title VII provides "It shall be an unlawful employment practice for the employer -- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin. . . ." Kremer, 458 U.S. at 480 n.20 (quoting 42 U.S.C. 2000(e)2(a)). In comparison, the Oklahoma statute provides: "It is a discriminatory practice for an employer: 1. To fail or refuse to hire, to discharge, or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, privileges or responsibilities of employment, because of race, color, religion, national origin, age, or handicap . . .;" Okla Stat. tit. 25 § 1302 (A)(1).

current claims differ from those asserted in her state action only because they are grounded solely on a violation of Title VII. Burch's pleadings before this Court are supported with a number of arguments previously asserted in the state action.[3] As the evidence and arguments advanced under both claims are indistinguishable, the Court finds that Burch's two lawsuits meet the same evidence test and have the identity of subject matter required under Oklahoma law.[4]

The second determination required by Carris is whether the state court was "one of competent jurisdiction." It is well settled that state courts share concurrent jurisdiction with federal courts for claims arising under Title VII. Yellow Freight System, Inc., v. Donnelly, 494 U.S. 820, 821 (1990). However, Burch argues that *res judicata* is inappropriate in the present case because she was unable to pursue the Title VII action at the time of the state proceeding.[5] Although this reasoning is not without merit, the Court finds it unnecessary to resolve whether this "formal" barrier prevents

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[3].For example, Burch currently argues that Title VII recognizes a discriminatory claim based on constructive discharge. (Pl.'s Mot. For Partial Summ. J., Docket 10, pp. 22-23). The court finds a large part of this argument identical to one advanced in the state proceeding. (Pl.'s Resp. To Def.'s Mot. For Summ. J., App. Of Ex. To Def.'s Br. In Supp. Of Mot. For Summ. J., Ex. H, Docket 7, pp. 16-20). Moreover, the Court also notices Burch's arguments in Propositions III and V of her Motion for Partial Summary Judgment are also in large part derived from Proposition V and VI of her state response.

[4].Faced with similar circumstances, the United States Supreme Court found that a state judgment involving a New York statute, one similar to Oklahoma's, precluded relitigation of the same cause of action under Title VII. Kremer, 456 U.S. at 480. The Kremer Court stated that "[t]he elements of a successful discrimination claim [under either statute] are virtually identical; petitioner could not succeed on a Title VII claim consistently with the [state judgment, because that] dismissal necessarily decided that petitioner's claim under New York law was meritless and thus it also decided that a Title VII claim arising from the same events would be equally meritless." Id.

[5].Burch was not able to litigate the federal claim until she received her right to sue letter from the E.E.O.C., which, she did not receive until July 27, 1995.

preclusion in instances where the Plaintiff elects to initiate the state action before she is able to sue under Title VII. Even if Burch is not precluded from litigating her claim, she would be collaterally estopped from relitigating the issues from which the claim arises.[6] Whether Burch is precluded from litigating her Title VII claim because of *res judicata*, or she is collaterally estopped from relitigating the issues, the preclusive effect is the same.

The final determination required by Carris is whether the state court rendered its judgment on the merits of Burch's case. Burch argues that the final judgment issued by the state court does not preclude the subsequent federal action because the judgment was not specific in its findings. The Court disagrees with Burch's conclusion; the state court indicated that "no substantial controversy as to the facts material to a determination of [that] litigation [existed], and such facts establish that Defendant . . . [was] entitled to judgment upon the Plaintiff's claims as a matter of law." Consequently, the Court finds that the state court's judgment established, as a matter of law, that Burch's claims were without merit.

Relatedly, Burch also argues that the state court reserved judgment on the present lawsuit. This reservation, according to Burch, prevents this Court from applying *res judicata* principles to her current claims. However, the Court finds that the state court did not "reserve" judgment, but merely

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[6]. The Oklahoma Supreme Court indicates that "[t]he doctrine of collateral estoppel, or issue preclusion, is activated when an ultimate issue has been determined by a valid and final judgment -- that question cannot be relitigated by parties, or their privies, to the prior adjudication in any future lawsuit. Carris, 896 P.2d at 527. Application of collateral estoppel generally "requires an identity of the parties to both proceedings[,]" and is appropriate when "a fact in issue in the second action was actually determined in the first adjudication." Id.

Additionally, The Kremer Court indicated that "*[r]es judicata* has recently been taken to bar claims arising under the same transaction even if brought under different statutes." 456 U.S. at 479 n.20. Consequently, the Kremer Court found the Plaintiff's Title VII claim precluded even though it was, at that time, uncertain whether the state court possessed jurisdiction over the Title VII claim. Id. at 481 n.22. This uncertainty existed, because the Court had "not decide[d] . . . whether jurisdiction to entertain Title VII claims is limited to federal courts." Id. at 479 n.20.

recognized that Burch's Title VII suit was separate from the action before that court.[7] The state court is unable to reserve judgment on claims not before it. Consequently, the Court finds that the first inquiry under Kremer is met; under Oklahoma law, Burch's state court judgment precludes a subsequent action under Title VII.

Finally, the second inquiry of Kremer requires this Court to determine whether Burch received a full opportunity to litigate her claims in state court. To meet this requirement, "state proceedings need do no more than satisfy the minimum procedural requirements of the . . . Due Process Clause . . . ." Kremer, 456 U.S. at 481. Since Burch has not raised this issue, the Court has no reason to doubt that Burch received all the process that she was constitutionally entitled to receive. Consequently, the Court finds Burch precluded from litigating the present lawsuit under principles of *res judicata*, or collateral estoppel.

B. Title VII Claims

Although the Court's findings on the preclusion issues disposes of Burch's case, Mazzio's argues, even if Burch's case is not precluded by the state judgment, this Court should grant Mazzio's motion for summary judgment because Burch has failed to state a prima facie claim under Title VII. Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). After examining the parties' undisputed facts, the Court finds that Burch's claims for sexual harassment and wrongful discharge are both without merit.

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[7] Judge Hogue stated: "The Court does not have before it, and makes no ruling upon, the justiciability or merits of the claims set forth [in Plaintiff's Title VII case]."(Journal Entry of J., Ex. J, Def.'s App. Of Ex., Docket 7).

Although the parties dispute whether the harassing conduct rises to the Title VII standard for a hostile working environment,[8] the Court finds that Mazzio's prompt response to Burch's complaint obviates the need for this determination. Under Title VII, "[a]n employer is not strictly liable for sexual harassment of one worker by another . . . . [Rather, an] employer's legal duty is discharged if it takes reasonable steps to discover and rectify [the] harassment." Bakersville v. Culligan Int'l Co., 50 F.3d 428, 432 (7th Cir. 1995). Furthermore, the reasonableness of an employer's response largely depends upon the "gravity" of the challenged conduct. Id. Mazzio's investigated the harassment the day after it received the complaint from Burch. When it confirmed Burch's allegations, Mazzio's immediately terminated Brooks. Consequently, as a matter of law, Burch's claim must fail because the Court finds that Mazzio's actions constituted a prompt and reasonable response to her complaint.

On her discharge claim, Burch argues that she was either constructively discharged or terminated in retaliation for challenging the offensive conduct. A "constructive discharge occurs when an employer deliberately makes or allows the working conditions to become so intolerable that the employer has no choice but to quit." Buchanan v. Sherrill, 51 F.3d 227, 229 (10th. Cir. 1995)(interpreting Oklahoma law)(citation and quotation marks omitted). "The test is whether a reasonable person would view the working conditions as intolerable and would feel compelled to resign." Id. Burch elected to resign from her position after Mazzio's eliminated the challenged conduct by terminating Brooks. Consequently, the Court finds that no reasonable person can

[8].To implicate Title VII, the challenged conduct must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . . ." Harris v. Forklift Sys., Inc., 114 S.Ct 367, 370 (1993). Further, the conduct must be perceived to be this severe by both the victim, and by a reasonable person. Id.

conclude that Burch had no choice but to quit.[9] Relatedly, because the undisputed facts establish that Burch quit her job, Burch's claim that she was terminated must also fail.

IV. CONCLUSION

ACCORDINGLY, IT IS ORDERED that Mazzio's motion for summary judgment pursuant to Fed R. Civ. P. 56 is **granted**. (Docket 5). Case No. 95-C-1111E is **dismissed**. Burch's motion for partial summary judgment is **denied** (Docket 10).

SO ORDERED THIS 28th day of June, 1996.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

[9].Similarly, the Buchanan Court determined that it is unreasonable to suggest that an employee who quit instead of accepting a transfer has "no choice" but to resign. 51 F.3d at 229.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 2 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HOMEWARD BOUND, INC., et. al.,	)	
Plaintiffs,	)	
vs.	)	**Case No: 85-C-437-E**
THE HISSOM MEMORIAL CENTER, et. al.,	)	
Defendants.	)	

ENTERED ON DOCKET

DATE JUL 0 2 1996

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on June 6, 1996 for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees, DHS, DRS, and OHCA's objections, and approves the Stipulation of the parties.

The Court hereby awards the firm Bullock & Bullock uncontested attorney fees in the amount of $56,574.30 and out of pocket expenses in the amount of $6,788.82.

IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to Plaintiffs' counsel, Bullock & Bullock, for attorney fees in the amount of $56,574.30 plus expenses in the amount of $6,788.82 and

a judgment in the amount of $63,363.12 is hereby entered on this day. A hearing on the contested fees and expenses in the amount of $3,185.45 will be set upon application of either party.

ORDERED this 1st day of July, 1996.

JAMES O. ELLISON
United States District Court

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ATTORNEYS FOR DEFENDANTS

(ORDER32.FEE)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD L. REAVIS aka RICHARD LEE REAVIS; DONNA F. REAVIS aka DONNA REAVIS aka DONNA FAYE REAVIS; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Rogers County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma,

Defendants.

Civil Case No. 96CV 153K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27 day of June, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, appear by Michele L. Schultz, Assistant District Attorney, Rogers County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, RICHARD L. REAVIS aka Richard Lee Reavis and DONNA F. REAVIS aka Donna Reavis aka Donna Faye Reavis, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, RICHARD L. REAVIS aka Richard Lee Reavis, signed a Waiver of Summons on March 27, 1996; that the Defendant, DONNA F. REAVIS aka Donna Reavis aka Donna Faye Reavis, signed a Waiver of Summons on March 27, 1996.

It appears that the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, filed their Answer on March 5, 1996; and that the Defendants, RICHARD L. REAVIS aka Richard Lee Reavis and DONNA F. REAVIS aka Donna Reavis aka Donna Fay Reavis, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, RICHARD L. REAVIS aka Richard Lee Reavis will hereinafter be referred to as "RICHARD L. REAVIS." The Defendant, DONNA F. REAVIS aka Donna Reavis aka Donna Faye Reavis, will hereinafter be referred to as "DONNA F. REAVIS. The Defendants, RICHARD L. REAVIS and DONNA F. REAVIS, are husband and wife.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot 12 in Block 2 of Battenfield Acres Fourth Addition, a Subdivision in Section 34, Township 21 North, Range 15 East of the I.B. & M., according to the recorded plat thereof, Rogers County, Oklahoma.

The Court further finds that on August 28, 1987, the Defendants, RICHARD L. REAVIS and DONNA F. REAVIS, executed and delivered to First Federal

Savings Bank of Oklahoma, their mortgage note in the amount of $61,916.00, payable in monthly installments, with interest thereon at the rate of 8.625 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, RICHARD L. REAVIS and DONNA F. REAVIS, husband and wife, executed and delivered to First Federal Savings Bank of Oklahoma a mortgage dated August 28, 1987, covering the above-described property. Said mortgage was recorded on August 31, 1987, in Book 767, Page 495, in the records of Rogers County, Oklahoma.

The Court further finds that on October 8, 1987, First Federal Savings Bank of Oklahoma, assigned the above-described mortgage note and mortgage to Mortgage Clearing Corporation. This Assignment of Mortgage was recorded on December 2, 1987, in Book 774, Page 259, in the records of Rogers County, Oklahoma.

The Court further finds that on July 25, 1988, Mortgage Clearing Corporation, assigned the above-described mortgage note and mortgage to the Secretary of Housing & Urban Development, its successors and assigns. This Assignment of Mortgage was recorded on July 27, 1988, in Book 789, Page 261, in the records of Rogers County, Oklahoma.

The Court further finds that on November 1, 1989, the Defendants, RICHARD L. REAVIS and DONNA F. REAVIS, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on August 1, 1990 and July 1, 1991.

The Court further finds that the Defendants, RICHARD L. REAVIS and DONNA F. REAVIS, filed their voluntary Chapter 7 petition in the United States Bankruptcy Court for the Northern District of Oklahoma, Case Number 89-281-W, which was discharged

on May 19, 1989, and was closed on July 6, 1989. The Defendants executed a Reaffirmation agreement with Plaintiff in reference to the subject property, which was filed with the Court on May 10, 1989.

The Court further finds that the Defendants, RICHARD L. REAVIS and DONNA F. REAVIS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, RICHARD L. REAVIS and DONNA F. REAVIS, are indebted to the Plaintiff in the principal sum of $92,196.44, plus interest at the rate of 8.625 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state income taxes in the amount of ~~$631.78~~ $308.59 KA, plus accrued and accruing interest, which became a lien on the property as of January 24, 1989. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, RICHARD L. REAVIS and DONNA F. REAVIS, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, RICHARD L. REAVIS and DONNA F. REAVIS, in the principal sum of $92,916.44, plus interest at the rate of 8.625 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.89 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of ~~$651.78~~ # 308.59 . LC, plus accrued and accruing interest, for state income taxes, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, RICHARD L. REAVIS, DONNA F. REAVIS, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, RICHARD L. REAVIS and DONNA F. REAVIS, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell

according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of ~~$631.78~~ #306.59, plus accrued and accruing interest, state income taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the

Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

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Attorney for Defendant,
State of Oklahoma, ex rel
Oklahoma Tax Commission

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

COMMERCE INSURANCE AGENCY, INC., an Oklahoma Corporation,	)	FILED
Plaintiff,	)	JUN 28 1996
and	)	
ROBERT G. ROGERS,	)	Phil Lombardi, Clerk U.S. DISTRICT COURT
Intervenor,	)	
vs.	)	**No. 96-C-188 E**
BILL MCBRIDE, an Individual; MJB TRUCKING; and MAC-PAC, INC.,	)	
Defendants,	)	
and	)	ENTERED ON DOCKET
UNITED STATES OF AMERICA,	)	DATE JUL 01 1996
Intervenor.	)	

ORDER EXCUSING DEFENDANT, BILL MCBRIDE FROM FURTHER PROCEEDINGS

NOW ON this 28 day of June, 1996, Motion to be Excused from Further Proceedings having been filed by Defendant herein; the Court upon consideration finds that Defendant, Bill McBride, is hereby excused from any further proceedings in the above entitled matter.

S/ JAMES O. ELLISON
HONORABLE JAMES O. ELLISON
United States District Court

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

In Re:	)	
BARBARA J. WILLIS,	)	
Debtor,	)	Case No. 96-C-90-E
LONNIE D. ECK,	)	
Appellant,	)	
vs.	)	
BARBARA J. WILLIS,	)	
Appellee.	)	

ORDER

On December 5, 1995, the Bankruptcy Court approved, over the objection of the Chapter 13 Standing Trustee for the Northern District of Oklahoma, the separate classification and treatment of student loan debts and other unsecured non-priority debts. Appellant appeals the decision of the Bankruptcy Court and asserts that the Bankruptcy Court's holding that the student loan debt may be classified and treated differently than other unsecured debt was improper. For the reasons discussed below, the Bankruptcy Court's decision is **REVERSED**.

I. STATEMENT OF FACTS & PROCEDURAL HISTORY

Appellee filed a voluntary petition under Chapter 13 on August 15, 1995. [See Record on Appeal ("ROA"), Joint Stipulation of Facts, ¶ 1.] Appellee filed her Chapter 13 Plan on August 30, 1995. [ROA, Joint Stipulation of Facts, ¶ 2.]

Appellee listed, on schedule F, creditors holding unsecured claims without priority in a total amount of $19,131.48. [ROA, Joint Stipulation of Facts, ¶ 3.] Included within the total of unsecured claims without priority are two student loan claims (totaling $9,926.66). [ROA, Joint Stipulation of Facts, ¶ 3.] Appellee's Chapter 13 Plan separates the unsecured creditors without priority into two classes. [ROA, Joint Stipulation of Facts, ¶ 4.] The student loan claims ($9,926.66) are classified as a "special unsecured class," with the proposed payment to that class set at 100%. [ROA, Joint Stipulation of Facts, ¶ 4.] All remaining unsecured creditors without priority ($9,204.82) are in a separate class, with a projected payment to that class at 10%. [ROA, Joint Stipulation of Facts, ¶ 4.]

The sole ground asserted by the debtor for the separate treatment of student loans and other unsecured claims is that student loans are nondischargeable. [ROA, Joint Stipulation of Facts, ¶ 5; Appellee's Response Brief in Chief, filed April 3, 1996 at 2.]

The Bankruptcy Court held that the separate classifications by the debtor did not unfairly discriminate between the claims. The Bankruptcy Court noted that the debtor has a legitimate interest in discriminating "against the unsecured creditors" because the "Code provides that student loans are not ordinarily dischargeable in

bankruptcy," and discrimination is therefore necessary to insure the debtor the benefit of a "fresh start." In re Willis, 189 B.R. 203, 205 (N.D. Okla. 1995); Memorandum Opinion at 4. The Bankruptcy Court noted that "[t]his Court is aware that its position on the issue of unfair discrimination is a minority view." Id.

Appellant asserts that separately classifying and treating the unsecured loans and the student loans unfairly discriminates against the unsecured creditors in violation of 11 U.S.C. § 1322(b)(1).

II. STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. Conclusions of law are reviewed *de novo*. Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988). "When reviewing factual findings, an appellate court is not to weigh the evidence or reverse the finding because it would have decided the case differently. A trial court's findings may not be reversed if its perception of the evidence is logical or reasonable in light of the record." In re Branding Iron Motel, Inc., 798 F.2d 396 (10th Cir. 1986) (citations omitted).

The parties agree that the issue presented to this Court is a matter of law subject to *de novo* review. See, e.g., In re Klien, 57 B.R. 818, 819 (9th Cir. BAP 1989).

III. ANALYSIS:

Prior to 1990, although non-dischargeable under Chapters 7 and 11, student loans were dischargeable under Chapter 13. However, in 1990, Congress amended the Bankruptcy Code and made student loans non-dischargeable under Chapter 13. In response to the congressional amendment, debtors filing under Chapter 13 began proposing plans which would permit the full repayment of student loan obligations at the "expense" of other unsecured (and dischargeable) debts.

Section 1322(b)(1) of the Code provides that a Chapter 13 plan may

> designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims.

11 U.S.C. § 1322(b)(1) (emphasis added). The statute does not prohibit, *per se*, the separate classification or treatment of claims, but provides that a plan may not "discriminate unfairly against any class so designated."

Since 1990, numerous bankruptcy courts, a few district courts, and one circuit court have addressed whether a debtor's separate classification and treatment of student loan debt violates the Bankruptcy Code's prohibition against "unfair discrimination." A well-reasoned opinion that is supportive of the "minority view" that a Chapter 13 plan which provides that nondischargeable student loans and other unsecured claims can be treated differently is In re Brown, 152 B.R. 232 (Bankr. N.D. Ill. 1993). The decision of the Bankruptcy Court in Brown was reversed by the

district court, in a well-reasoned decision supportive of the "majority view," McCullough v. Brown, 162 B.R. 506 (N.D. Ill. 1993). This Court concludes that the court's decision in McCullough is the more persuasive, and adopts the "majority view."

In concluding that the separate classification and treatment of student loan debt and other unsecured debt was not "unfairly discriminatory," the Bankruptcy Court focused primarily on the "fresh start" which is the "essence of modern bankruptcy law." Willis at 205; Memorandum Opinion at 4. The Court recognizes that the need to provide a "fresh start" to the debtor is one of the underpinnings of bankruptcy law. However, Congress, which created the bankruptcy law and the "fresh start" concept also determined that student loans should not be discharged in Chapter 13 proceedings.

> But perhaps the most telling piece of evidence in that direction actually derives from Congress' affirmative decision to withdraw student loans from Chapter 13 discharge. It must be remembered that the very congressional decision that rendered student loans nondischargeable in Chapter 13 proceedings reflected Congress' policy decision that excluded such debts from a pure fresh-start analysis: Congress has expressly decided that a debtor who has not paid off 100% of those loans will not emerge from Chapter 13 washed clean of the indebtedness. It is thus ironic (to say the least) to point to the generalized bankruptcy goal of a fresh start as the claimed "justification" for a plan that is skewed in favor of paying debts that will have to be paid in all events, whatever the plan might provide. Colfer, 159 B.R. at 610 puts the matter simply, "Congress has made the call. The courts should not approve as 'fair' discriminatory classification schemes 'needed' only for the purpose of

> mitigating the consequences of statutory discharge exceptions."

McCullough at 514. Consequently, although providing a "fresh start" to a debtor is important, this concept alone cannot justify the approval of a Chapter 13 plan which provides for the payment of the full amount owed for a student loan (because such a debt is nondischargeable), but does not provide for the full payment of remaining unsecured (but dischargeable) debt.

Section 1322(b)(1) of the Code provides that a Chapter 13 plan may not discriminate unfairly against any class. 11 U.S.C. § 1322(b)(1). The emphasis of the statute is the "discrimination" against the creditor. The sole ground asserted by the debtor for the separate treatment of student loans is that the loans are nondischargeable. This reason focuses solely upon the interests of the debtor, and, simply put, does not justify the discriminatory treatment which Appellee seeks. McCullough, 162 B.R. at 517 (N.D. Ill. 1993) ("But all of that having been said, what remains clear is that no Chapter 13 plan can be approved that treats unpaid student loans more favorably than other unsecured debts solely because they are student loans."). Appellee advances no other reason to support the preferential treatment of student loans. Absent some other justification for the discriminatory treatment, the Court cannot affirm the approval of a Chapter 13 Plan permitting the disparate treatment of student loans and other unsecured debts. See also Groves v. LaBarge, 39 F.3d 212 (8th Cir. 1994) (nondischargeability of student loan debt is insufficient justification for the substantially different treatment of student loan debt as compared

to other unsecured debt); In re Sperna, 173 B.R. 654 (9th Cir. BAP 1994) ("[T]he nondischargeable nature of a student loan debt is not, by itself, a reasonable basis for discrimination."); In re Taylor, 137 B.R. 60 (Bankr. W.D. Okla. 1992) (concluding that a "bright line" should be drawn prohibiting any discrimination in favor of nondischargeable student loan debt over other unsecured debt).

Accordingly, the decision of the Bankruptcy Court is **REVERSED** and **REMANDED** for further proceedings consistent with this order.

Dated this 27th day of June 1996.

JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NATIONAL GYPSUM COMPANY, **Plaintiff,** vs. MARATHON ENGINEERS/ ARCHITECTS/PLANNERS, INC., **Defendant and** **Third-Party Plaintiff,** vs. DOAR & ASSOCIATES, P.A., J.F. AHERN COMPANY, **and** TIC, THE INDUSTRIAL COMPANY, INC. **Third-Party Defendants.**	)	Case No. 95-C-160K

ENTERED ON DOCKET
DATE JUL 0 1 1996

F I L E D

JUN 2 8 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION ~~AND ORDER~~
FOR DISMISSAL

IT IS HEREBY STIPULATED by and between the parties, by their respective counsel, that the above-captioned action be dismissed, with prejudice, and without further costs or attorneys' fees to any party.

Dated this 28 day of June, 1996.

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415 South Boston Avenue
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918-582-9710

BY _____
Harlan S. Pinkerton, Jr.
Attorney for Plaintiff
National Gypsum Company

Dated this 17th day of June, 1996.

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BY Patricia Ledvina Himes
Patricia Ledvina Himes
Attorney for Third-Party
Defendant
TIC, The Industrial
Company, Inc.

Dated this 12 day of June, 1996.

Reinhart, Boerner, Van Deuren,
Norris & Rieselbach, s.c.
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Milwaukee, WI 53202-3186

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BY Kathleen S. Donius
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Attorney for Defendant
and Third-Party Plaintiff
Marathon Engineers/Architects/
Planners, Inc.

Dated this 27 day of June 1996.

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BY
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Doar & Associates, P.A.

Dated this 26th day of June, 1996.

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BY
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Attorney for Third-Party
Defendant
J.F. Ahern Company

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES ALGIER HARGETT aka James A. Hargett; DAHL KATHLEEN HARGETT aka Dahl K. Hargett; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET
DATE JUL 0 1 1996

FILED
JUN 28 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Case No. 95 C 984K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 28 day of June, 1996.

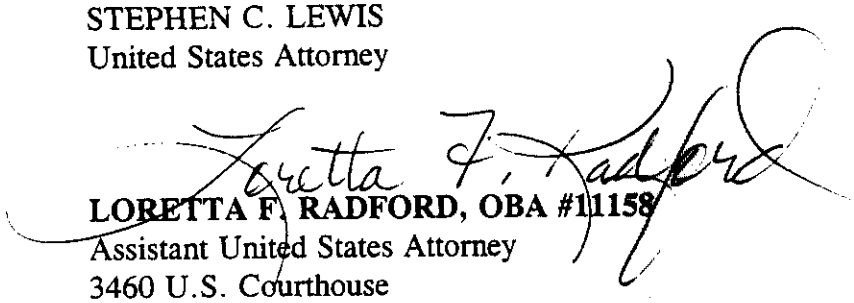
s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS MAILED BY COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
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(918) 581-7463

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICK VARNER,

Plaintiff,

vs.

HAWKEYE EAGLE TRANSPORTATION EQUIPMENT CO., INC., et al.,

Defendants.

No. 95-C-925-K

JUDGMENT

This matter came before the Court for consideration of the motion for summary judgment of defendant International Harvester Company. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendant International Harvester Company and against the plaintiff.

ORDERED this 28 day of June, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

33

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICK VARNER,

Plaintiff,

vs.

HAWKEYE EAGLE TRANSPORTATION EQUIPMENT CO., INC., et al.,

Defendants.

No. 95-C-925-K

ORDER

Before the Court are the motions of defendant International Harvester Company (IHC) (#4) and of the plaintiff (#11) for summary judgment. This action began in state court, when plaintiff filed his petition August 16, 1995. Plaintiff allegedly was injured August 16, 1993 when a bucket connected to a hydraulic system suddenly dropped, striking plaintiff. The bucket was attached to a trailer, not manufactured by IHC, which was in turn attached to a truck/tractor, which was manufactured by IHC. The petition alleges in boilerplate fashion that the named defendants were involved in the manufacture and sale of "a certain waste disposal truck, hydraulics and valves." IHC removed the action to this Court September 15, 1995.

IHC moves for judgment on the basis plaintiff has failed to allege a defect in the truck/tractor which carried the hydraulic system and bucket. As stated, it is only the truck/tractor which IHC manufactured. Plaintiff's brief in response (#12) states the motion is premature until discovery is complete. Accompanying the brief is what plaintiff presents as the affidavit of an expert.

The affiant, a "licensed professional engineer", describes what appears to be an alleged design defect in the hydraulic system (i.e., a pair of controls--one of which raises or lowers the bucket and the other which tilts the bucket--could be incorrectly used by an operator. Such incorrect use could cause the bucket to jump out of its resting notches and drop on a person below). He then states "[IHC] was the manufacturer of the truck chassis. It is unknown as to what other IHC components were part of the whole system. As the investigation progresses, IHC's knowledge of the total system and the integration of their components with other components, if any, will become known." Further, "[a]dditional discovery is required to determine what role IHC products had in causing Mr. Varner's injuries."

Rule 56(e) F.R.Cv.P. requires an affidavit to "set forth specific facts showing that there is a genuine issue for trial" (emphasis added). The affidavit of plaintiff's expert fails this requirement. Describing a hydraulic system, trailer and the truck/tractor to which they are attached as the "whole system" is insufficient to maintain a products liability claim against the truck manufacturer. An allegation of a specified defect in the specified product is essential. IHC has submitted an affidavit from one of its own engineers which states IHC did not manufacture the trailer, the hydraulics, the bucket or the hydraulic controls. (Affidavit of Bryan Carlson at ¶5).

Plaintiff has not requested deferral of ruling pursuant to Rule 56(f) F.R.Cv.P., but even if such a request is implicit, the

Court denies it. Simply expressing a hope that additional discovery will uncover a defect in a defendant's product is insufficient to survive that defendant's motion for summary judgment. Plaintiff's expert does not state he has examined the truck involved in the accident, but rather he has "reviewed a videotape showing the accident truck and similar trucks, demonstrating how the accident happened." IHC has submitted a copy of the referenced videotape, and correctly notes the tape is an examination of the trailer and its components, not the IHC truck/tractor. Plaintiff has failed to raise a genuine issue of material fact demonstrating this lawsuit should proceed against IHC.

It is the Order of the Court that the motion of the plaintiff for summary judgment (#11) is hereby denied. The motion of defendant International Harvester Company for summary judgment (#4) is hereby granted.

ORDERED this 28 day of June, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA LITTLE,

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant.

No. 94-C-1078-K

FILED
JUN 2 8 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of plaintiff for order of dismissal without prejudice. This action was filed in state court September 26, 1994, and was removed to this Court. Two case management conferences have been held. At the second, plaintiff's counsel advised that the schedule established at the first conference could not be met, due to plaintiff's poor health and necessary surgery, allegedly as a result of the incident giving rise to this lawsuit. The present motion cites the same difficulties.

Defendant objects, primarily on the basis plaintiff "has failed to cooperate in discovery." Defendant requests an award of costs pursuant to Rule 41(d) F.R.Cv.P., but that section, dealing with a previously-dismissed action, appears inapplicable. Plaintiff has filed a reply to defendant's response, detailing the cooperation between counsel regarding discovery and disputing certain of defendant's assertions. Defendant has not requested leave to respond to plaintiff's reply.

When considering a motion to dismiss without prejudice, the

important aspect is whether the opposing party will suffer prejudice in the light of the valid interests of the parties. Phillips USA, Inc. v. Allflex USA, Inc., 77 F.3d 354, 357 (10th Cir.1996) (quoting Clark v. Tansy, 13 F.3d 1407, 1411 (10th Cir.1993)). Relevant factors are (1) the opposing party's effort and expense in preparing for trial; (2) excessive delay and lack of diligence on the part of the movant; (3) insufficient explanation of the need for a dismissal. A district court may also consider the present stage of litigation. Allflex, 77 F.3d at 358. Considering all these factors, the Court concludes defendant has not shown sufficient prejudice to warrant denial of dismissal or the imposition of conditions upon an order of dismissal.

It is the Order of the Court that the motion of the plaintiff to dismiss without prejudice is hereby granted, and this action is hereby dismissed without prejudice.

ORDERED this 28 day of June, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILLY J. WILLIAMS,

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner of Social Security,

Defendant.

No. 94-C-827-K

J U D G M E N T

This matter came before the Court for consideration of the appeal of Plaintiff, Billy J. Williams, to the Secretary's denial of Social Security disability benefits. The issues having been duly considered, a decision having been rendered, and in accordance with the Order entered contemporaneously reversing and remanding the decision,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered as stated above.

IT IS SO ORDERED THIS 28 DAY OF JUNE, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILLY J. WILLIAMS,

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner of Social Security,

Defendant.

No. 94-C-827-K

ORDER

Before the Court is the Plaintiff's objection (Docket #11), filed January 2, 1996, to the Magistrate Judge's Report and Recommendation (Docket #10). The Magistrate Judge recommended affirmance of the decision to deny benefits.

Plaintiff claims that the Magistrate Judge failed to properly consider the Defendant's burden of proof at Step Five of the evaluation process. Plaintiff further contends the Magistrate Judge's recommendation, filed December 22, 1995, accepting the Administrative Law Judge's ("ALJ") assessment of the Plaintiff's residual functional capacity and finding Plaintiff able to perform a significant number of alternative jobs at the medium exertion level, is not supported by substantial evidence.

I. Standard of Review

When a timely objection has been made to a portion of a magistrate judge's report, the district court must make a *de novo* determination, but is not required to conduct a *de novo* hearing, with respect to the portion of the report objected to. *U.S. v. One*

Parcel of Real Property, 73 F.3d 1057 (10th Cir. 1996). The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions. Fed.R.Civ.P. 72(b). *See also* 28 U.S.C.§ 636(b)(1). The court reviews the Secretary's[1] decision to determine whether the ruling is supported by substantial evidence and whether the correct legal standard was applied. *Hamilton v. Secretary of Health & Human Servs.*, 961 F.2d 1495, 1497 (10th Cir. 1992). The court does not reweigh the evidence nor does it substitute its own discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992).

II. Discussion

Plaintiff argues the magistrate judge failed to properly consider the shifting of burden of proof at Step 5 of the sequential evaluation procedure (a) by failing to point to specific evidence indicating Plaintiff can perform the reaching/lifting demands of medium work and (b) by failing to elicit vocational testimony based on hypothetical questions reflecting Plaintiff's limitations. Each of these objections will be addressed below.

---

[1]Pursuant to P.L. No. 103-296, the Social Security Independence and Program Improvements Act of 1994, the function of the Secretary of Health and Human Services in social security cases has been transferred to the Commissioner of Social Security, Shirley S. Chater. Commissioner of Social Security is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the defendant in this appeal, pursuant to Fed.R.App.P. 43(c). The court will continue to refer to the Secretary's ruling because she was the appropriate party at the time of the underlying decision.

A. Alleged failure to point to specific evidence indicating Plaintiff can perform reaching/lifting demands of medium work.

The ALJ based his finding that Plaintiff could perform the reaching/lifting demands of medium work[2] on the following:

> a. Examination of Plaintiff by consulting physician, Dr. E. Joseph Sutton, II, on December 29, 1992 is consistent with medium exertional activity [R. 381-388]. Dr. Sutton determined the claimant has "essentially normal" range of motion except for the left shoulder and has good bilateral grip strength and upper extremity strength. The residual functional capacity ("RFC") of claimant as assessed by Dr. Sutton indicated claimant "could sit, stand and walk a total of eight hours in a workday;" "should be able to lift or carry any weight commensurate with his size;" "has normal upper extremity strength and would not have any difficulty lifting any weight to *at least waist high;*" "has no restriction in his hands with regard to repetitive movements and has good bilateral grip strength;" "has good finger-thumb approximation on both hands;" "would be able to continuously bend, squat, crawl, climb or reach. The only restriction would be that of reaching with his left arm would have to be below about shoulder height.... He would be able to reach in front of him

[2]Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. 20 C.F.R. § 404.1567(c).

or off to the side without difficulty. There are no restrictions regarding any of the environmental factors." [R. 382-383].

b. Prior assessment of Claimant's RFC by the Disability Determination unit staff physicians was consistent with 1992 report of Dr. Sutton [R. 102-108]. Basic strength factors: - limited but retains capacity to lift and/or carry 50 lbs; frequently lift and/or carry 25 lbs.; unlimited push and/or pull; stand, sit and/or walk a total of about 6 hours per 8-hr work day; and limited only in reaching overhead with left arm.

c. The range of claimant's activities which include fishing and golfing maybe twice a year, the ability to drive, attend church occasionally, daily upper body exercises, and housekeeping chores are consistent with medium exertional assessment [R. 299, 307, 309, 311, 351].

d. Testimony by claimant that he can lift 20 pounds, possibly 50 pounds; is able to carry groceries in, gathers cans to sell, able to occasionally wash cars, and rake leaves is consistent with medium exertional assessment [R. 296,309-311].

e. Dr. Cooper's examination of claimant on May 18, 1989, and the examination and RFC assessment of claimant by Dr. Sutton in December 1992 are consistent with the claimant being able to perform medium exertional activity with limited use of his left upper extremity only for reaching or lifting above shoulder level [R. 160, 270].

f. Occasionally takes Tylenol and Advil for relief of pain but the medication would not preclude claimant from performing medium exertional activity [R. 298, 303, 395].

Furthermore, the ALJ determined that the claimant's testimony was credible only to the extent it did not conflict "with the objective medical evidence or other objective evidence of record." (R. 269). Determinations of credibility by the Secretary are to be upheld unless unsupported by substantial evidence. *Diaz v. Secretary of Health & Human Servs.*, 898 F.2d 774, 777 (10th Cir. 1990). In this case the Secretary found the claimant "exaggerated and embellished his symptoms" which "cast great doubt upon the credibility of claimant's testimony concerning his functional limitations and the effect of pain on his ability to perform work." [R. 269]. The Secretary is in a better position to make such credibility determinations than the Court. Accordingly, the Court does not substitute its own discretion for that of the Secretary. *See Fowler v. Bowen*, 876 F.2d 1451, 1455 (10th Cir. 1989).

The Court has examined the record and concludes there is such relevant evidence as a reasonable mind might accept as adequate to support the conclusion that Plaintiff can perform the reaching/lifting demands of medium exertional activity except for reaching or lifting above shoulder level with his left arm. *Bernal v. Bowen*, 851 F.2d 297, 299 (10th Cir. 1988)

B. Alleged failure to elicit vocational testimony based on hypothetical reflecting Plaintiff's true limitations, improper

reliance on "the Grids," and reliance on vocational testimony which conflicts with the *Dictionary of Occupational Titles*.

Plaintiff contends that his advanced age, his high school education, and his lack of transferable skills when applied to the rules of the Vocational-Medical Guidelines create a presumption that there are not a significant number of light and sedentary jobs which he could perform. Citing *Thompson v. Sullivan*, 987 F.2d 1482, 1490-91 (10th Cir. 1993), Plaintiff states the burden of proof is on the Defendant to prove that Plaintiff retained the capacity to perform alternative work and to show that Plaintiff can perform a substantial majority of the occupations in his occupational category. See also *Evans v. Chater*, 55 F.3d 530 (10th Cir. 1995). This argument is inapposite, because the ALJ in this case did not place exclusive reliance on the grids, which was the issue discussed in *Evans*.

The ALJ determined Williams had no past relevant work as defined in the Social Security Act. Then, although Williams argues the ALJ neglected to shift the burden of proof to the Secretary, the record reflects the ALJ did, in fact, shift the burden of proof to the Secretary to demonstrate Williams retains the residual functional capacity to perform jobs which exist in significant numbers in the national economy. The ALJ solicited testimony from the vocational expert, Cheryl Mallon, to attempt to satisfy this burden. *See* 20 C.F.R. § 404.1566(e); *Hargis v. Sullivan*, 945 F.2d 1482, 1489 (10th Cir. 1991). When posing the hypothetical to the

vocational expert ("VE"), the ALJ stated, in part:

> Let's assume we have a claimant who is 61 years old....who has a 12th grade education...good ability to read, write and use numbers....would have, in general, the physical capacity to perform...medium, light and sedentary work activity...this individual would be able to sit...stand...walk during an eight-hour day with normal breaks for up to eight hours...would be able to bend, squat, crawl, climb and reach on a continuous basis. However, I'm going to --- in regard to reaching, the restriction that would be applicable would be that this individual, his reaching with his left arm would have to be below about shoulder height...this individual would be afflicted with symptomatology from a variety of sources, which would include mild to moderate pain which would be of sufficient severity as to be noticeable to him...but...he would be able to remain attentive and responsible in a work setting and to carry out normal work assignments within the limitations I've indicated satisfactorily...this individual also takes medication for the relief of his symptomatology but the medication would not preclude him from functioning at the medium, light or sedentary levels, and he would be able to remain reasonably alert to perform required functions presented in the work setting. We've already concluded that this individual has, based upon the...evidence that we have before us, no past relevant work... With that hypothetical in mind,...can you identify any jobs which...you believe could be performed by such an individual in my hypothetical,...and if so...describe the number of jobs existing in the national and regional economy [R. 316-318].

The VE identified the following unskilled jobs: 1,100,000 medium exertional janitorial jobs in the national economy with 120,000 regionally; 271,000 medium grounds keeping jobs nationally with 38,000 regionally; 131,000 light delivery driver jobs nationally and 16,000 regionally; 144,000 sedentary assembly jobs and 18,000 regionally. The ALJ further questioned the VE:

> Q. Okay. Are there any vocationally relevant factors that I have not considered in my hypothetical to you?
>
> A. No.

[R. 318-319]. Based on the VE's testimony, the ALJ concluded Williams' impairments did not prevent him from performing work which exists in significant numbers in the national economy, namely janitor and grounds keeper in the medium exertional level; delivery driver in the light exertional; and assembly worker in the

sedentary range [R. 275]. Consequently, the ALJ found Williams was not disabled within the definition of 42 U.S.C. § 405(g).

Williams claims the ALJ did not accurately describe his limitations in the hypothetical posed to the vocational expert. "While it is clear that questions posed to vocational experts ... should precisely set out the claimant's particular physical and mental impairments, a proper hypothetical question is `sufficient if it sets forth the impairments which are accepted as true by the ALJ.'" *Gay v. Sullivan*, 986 F.2d 1336, 1340-41 (10th Cir. 1993) (citations omitted). Dr. Sutton testified plaintiff "would not have any difficulty lifting any weight to at least waist high." Plaintiff argues the hypothetical question should have stated plaintiff would have difficulty lifting weight between waist height and shoulder height. The issue is a close one. In view of the fact that the Court has determined to remand on another ground, the ALJ may wish to consider refinement of his hypothetical question.

However, according to 20 C.F.R. § 404.1563(d), the turning point in this case is whether the Secretary can meet her burden by identifying jobs which claimant, now close to retirement age, can perform. *See Nielson v. Sullivan*, 992 F.2d 1118, 1120 (10th cir.1993)("The Secretary must overcome a higher burden at step five to deny benefits to claimants of advanced age.") Section 404.1563(d) states:

> We consider that advanced age (55 or over) is the point where age significantly affects a person's ability to do substantial gainful activity. If you are severely impaired and of advanced age and *you cannot do medium work* ... you may not be able to work unless you have skills that can be used in (transferred to) less

> demanding jobs which exist in significant numbers in the national economy. If you are close to retirement age (60-64) and have a severe impairment, we will not consider you able to adjust to sedentary or light work unless you have skills which are *highly marketable* (emphasis added).

Contrary to Plaintiff's argument, if the claimant is able to perform medium exertional work, then his age (even though close to retirement) is not a factor nor would it alter the outcome of the case. However, if the claimant is unable to "do medium work," "the Secretary cannot find that the claimant's skills are transferable to light or sedentary work unless there is `very little, if any, vocational adjustment ... and the claimant's skills are `highly marketable,' *Emory v. Sullivan*, 936 F.2d 1092 (10th Cir. 1991) (citations omitted). In this case both prongs of this alternative work determination were resolved. The ALJ determined Williams had no acquired skills which are transferable to the skilled or semi-skilled work, and the vocational expert testified neither were Williams' skills highly marketable [R. 273, 319]. Thus, logic suggests that given the Plaintiff's age, education, and residual functional capacity, neither the light nor the sedentary jobs identified by the VE can satisfy the Secretary's burden. Therefore, only the unskilled medium exertional janitorial and grounds keeping jobs are remaining to satisfy the burden.

But, as Plaintiff points out, neither of these jobs can satisfy the Secretary's burden either. The Court finds that the VE's testimony is in error since her classification of janitor and grounds keeper as "unskilled" work is inconsistent with the classification given by the *Dictionary of Occupational Titles*. By

statutory definition, unskilled work is work "which needs little or no judgment to do simple duties that can be learned on the job in a short period of time...a person can usually learn to do the job in 30 days, and little specific vocational preparation and judgment are needed." 20 C.F.R. §404.1568(a). The DOT classification for janitor and grounds keeper is "SVP"[3] 3, which requires vocational preparation of "over 1 month up to and including 3 months" and are "semi-skilled" jobs. *See* Janitor § 382.664-010, Grounds keeper § 406.684-014. *See also Terry v. Sullivan*, 903 F.2d 1273, 1278 (9th Cir. 1990) (jobs which carry SVP of 3 are semi-skilled jobs).

"The regulations provide that the Secretary will take notice of the *Dictionary of Occupational Titles*, published by the Department of Labor, in determining the appropriate category of a job." *Campbell v. Bowen*, 822 F.2d 1518, 1523 n.3 (10th Cir. 1987) (citing 20 C.F.R. § 404.1566(d)(1); *see also Smith v.* Shalala, 46 F.3d 45, 47 (8th Cir. 1995). The Tenth Circuit has held that when expert testimony conflicts with the DOT, the DOT controls. *Campbell*, 822 F.2d at 1523. So, in this case, although the vocational expert testified there were significant unskilled jobs which Plaintiff could perform in the national economy, the DOT classifies these jobs as semi-skilled, "which need some skills"...and which is "more complex than unskilled work." 20 C.F.R. § 404.1568(b). Consequently, the Secretary has failed to meet her burden by identifying jobs which Plaintiff could perform.

[3]SVP is specific vocational preparation.

Because the ALJ has failed to sustain her burden at Step 5 of the sequential analysis by identifying a significant number of jobs available in the national economy which Plaintiff, despite his impairments, could perform, the Court concludes the Secretary's determination is not supported by substantial evidence.

Claimant is now 64[4] years of age, a person who is "close to retirement age." 20 C.F.R. § 404.1563(d). The ALJ determined at Step 2 that Claimant has "severe vocational impairments" [R. 274]. The ALJ determined that claimant has no past relevant work, and accordingly, "does not have any acquired work skills which are transferable to the skilled or semi-skilled work activities of other work" [R. 275]. Thus, upon remand, it is very likely the Secretary would be obliged to return a finding that Claimant is now disabled. See 20 C.F.R. Pt. 404, Subpt. P, App. 2. However, the Court cannot assume this. Despite plaintiff's request to remand with direction for payment of benefits, the Court declines to do so.

CONCLUSION

This Court, upon review, orders as follows: the decision of the Appeals Council below, which denied plaintiff's application for benefits, is hereby REVERSED, and this action is remanded to the

[4]Claimant's birthdate is November 8, 1931 [R.25].

Secretary for additional proceedings not inconsistent with this Order.

ORDERED this 28 day of June, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

P.M.M. ENTERPRISE, INC., et al)
)
Plaintiffs,)
)
vs.) No. 95-C-1125-K
)
STRATFORD HOUSE INNS, INC.,et al,)
)
Defendants.)

O R D E R

Before the Court is the motion of the defendants to dismiss. Plaintiffs are various motel owners, who use the name Stratford House Inns in connection with their establishments. Plaintiffs received letters from a lawyer representing the defendants, which stated plaintiffs were violating a registered trademark by their use of the name, and which threatened legal action if plaintiffs did not cease and desist. Plaintiff filed this action, seeking a declaratory judgment that defendants have abandoned the trademark for non-use over the years and that plaintiffs' use is lawful. Plaintiffs also request a declaratory judgment that defendants' pending application to renew their trademark is invalid because of submission of false information and failure to disclose other information.

In its motion to dismiss, defendants appear to be arguing (1) there is no case or controversy and (2) federal jurisdiction does not exist. When a declaratory judgment plaintiff files an action in anticipation of a potential action by the declaratory judgment defendant, the threat of litigation is sufficient to create a

justiciable controversy. GNB Battery Tech. v. Gould, 65 F.3d 615, 627 (7th Cir.1995). This test is satisfied here.

If the threatened action by the declaratory judgment defendant does not present a federal question, the court has no subject matter jurisdiction in an action between non-diverse parties. Playboy Enterprises v. Public Serv. Comm., 906 F.2d 25, 29 (1st Cir.1990). These parties are non-diverse, and the dispositive issue is whether a federal question is presented. Both parties agree on the rule pronounced in MCCARTHY ON TRADEMARKS, section 32.21[2] as follows: "Under modern decisions, a plaintiff who has no federal mark registration may maintain a federal declaratory judgment suit which puts in issue the validity of defendant's federal mark registration."

Defendants assert in their brief they had valid registrations with the Patent and Trademark Office, but the registrations were canceled in 1989. Since defendants do not have a federally registered trademark, they argue, this Court has no subject matter jurisdiction over this action, which instead involves common law trademark claims.

Plaintiffs respond by attaching to their brief a copy of a complaint filed July, 1995 in Missouri federal court by present defendant Stratford House Inns, which asserts violation of federal trademark law and in paragraph 13 cites its registration (or application for registration)[1] of the trademarks potentially

[1]The Court cannot discern for which trademarks the Missouri complaint asserts registration and for which it merely asserts pending applications for registration.

involved in this case. Under the doctrine of "judicial estoppel" a party cannot take contradictory positions in separate litigation. Stratford House Inns' positions may not in fact be contradictory, but the Court cannot resolve this factual issue in the context of a motion to dismiss.[2]

Defendants also argue the plaintiffs' challenge to the pending registration proceeding is premature and improper. The Court agrees. In Goya Foods, Inc. v. Tropicana Products, Inc., 846 F.2d 848 (2d Cir.1988), the court said the doctrine of primary jurisdiction did not require the district court to wait for the Patent and Trademark Office decision, when the district court case concerns alleged infringement. Id. at 853-54. This is not what plaintiffs request in paragraph 54 of their complaint, however. They request this Court to declare invalid the application presently pending before the Patent and Trademark Office. Plaintiffs have cited no authority for such judicial intervention in the administrative process. If plaintiffs believe false information has been presented to the PTO, they should bring such allegations in front of that body. This Court will not pre-empt the ongoing application process as plaintiffs request.

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[2]Defendants could argue they would not have a trademark registration pending before the Patent and Trademark Office if they believed they already had valid federal trademarks. Plaintiffs could respond this is merely defendants' attempt to "cover all bases." Again, this is a factual issue appropriate for a summary judgment motion.

It is the Order of the Court that the motion of the defendants to dismiss complaint (#3) is hereby granted as to plaintiffs' request to declare invalid the pending trademark registration No. 74/675,822. In all other respects, defendants' motion to dismiss is denied.

Plaintiffs' motion for admission of Lisa M. Ward pro hac vice (#8) is hereby granted. The joint motion of the parties to expedite (#9) is hereby granted.

ORDERED this 28 day of June, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MISTY L. MOYDELL aka MISTY MOYDELL aka MISTY LYNN MOYDELL; JEFFREY D. MOYDELL aka JEFFREY DAVID MOYDELL aka JEFF D. MOYDELL aka JEFFREY MOYDELL; TULSA ADJUSTMENT BUREAU, INC.; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	
	)	
Defendants.	)	Civil Case No. 95-CV 1061BU

ORDER

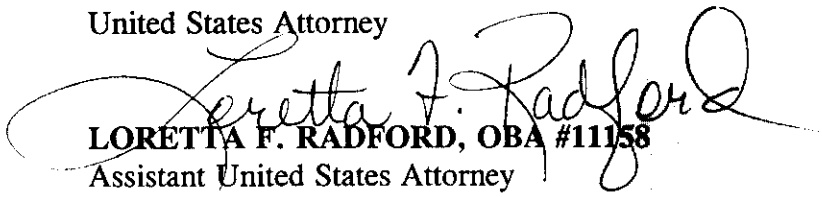
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that the Entry of Default By Court Clerk filed on the 28th day of May, 1996, the Judgment of Foreclosure entered herein on the 29th day of May, 1996, and the Notice of sale filed on the 13th day of June, 1996, are vacated, the Marshal's Sale now scheduled for the 5th day of August, 1996, at 10:00 a.m., is canceled, and the action is dismissed without prejudice.

Dated this 28th day of June, 1996.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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LFR:flv

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBRA A. NEWMAN,
SS# 440-58-0733,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of the Social Security Administration,

Defendant.

NO. 95-C-866-M

JUDGMENT

This case was previously remanded for further administrative proceeding [Dkt. 10] on May 8, 1996 and Judgment entered for Plaintiff and against Defendant. Dated this 28th day of June, 1996.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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